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IS AN AUTOMOBILE A "DANGEROUS INSTRUMENT" WITHIN THE MEANING OF THE RULE HOLDING A MASTER LIABLE FOR ITS PERMITTED PERSONAL USE BY HIS SERVANT?

It is a rule of law well settled by authority that where a master permits his servant to use for his personal gratification or profit an instrument inherently dangerous, the master will be liable for the injuries negligently effected by the servant with such instrument.

Is an automobile a "dangerous instrument" within the rule just stated as will entail a liability on the owner of an automobile for injuries negligently inflicted by his chauffeur upon third persons while said chauffeur is in sole charge of the machine and using it for his own purposes with the consent of the owner. This was the issue in the recent case of *Cunningham v. Castle*, 111 N. Y. Supp. 1057, where the court reached the following conclusion: First the master would not be liable in such a case as the servant at the time was engaged upon his own and not his master's business, unless the automobile should be considered a "dangerous instrument;" second, that an automobile does not belong in the category of dangerous articles, the mere permission to use which will involve the owner in liability for the negligence of the licensee. On this latter point the court said: "For the purposes of this discussion it must be conceded that the chauffeur was not engaged in the master's business, but was on a private pleasure trip of his own and was using therein the master's automobile with the master's knowledge and consent. It is urged that the automobile was a dangerous instrumentality, and that having been intrusted to the chauffeur, the liability of the master still attached because of its dangerous character. The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is more dangerous *per*

se than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. There is no evidence that the chauffeur was not competent and qualified to run the machine. In fact, he was employed by the defendant for that very purpose. If a gamekeeper had borrowed his master's gun and had gone from the estate on a hunting expedition of his own and had negligently shot a man, would the master be responsible because he was using that instrumentality, which might be dangerous if carelessly used, the gun? I do not think that the question of the ignorance or consent of the master has any bearing whatever upon his liability. The fact that the servant has used the horses or the automobile without his consent has probative force upon the proposition as to whether or not the servant was engaged in the master's business and was acting within the scope of his employment. The question is whether he was or not. If without the knowledge of his master he took the car from the garage to a machine shop to have it fixed and an accident occurred, the fact of the want of knowledge on the master's part would not affect the liability, because the act would be within the scope of the servant's employment and in the prosecution of the master's business. If the chauffeur were granted a two-weeks' vacation and the master said to him: 'I am going off on a trip and will not need the machine; you may take it and use it for your own pleasure while I am gone,' I cannot think that he would be responsible for any negligence of the chauffeur during that period."

The dissenting opinion by Justice Houghton in the principal case contended that the character of the use to which the automobile might be put by a chauffeur was sufficient to render the owner liable for injuries to third persons where such use of his machine was with his express consent. Justice Houghton argued as follows: "While a powerful automobile may not, strictly speaking, be deemed a dangerous instrument, it may become so if recklessly driven. They are so dangerous that the legislature has prescribed that their owner-

ship must be registered, and the driver licensed, and that speed in different localities must be regulated. Motor Vehicle Law, Laws 1904, Chap. 538. The defendant recognized this when he instructed his servant to be careful on the trip which he permitted him to make. If a railroad official should loan a locomotive to one of the company's engineers for the purpose of hurriedly visiting a distant locality, it could hardly be said that the engineer alone would be liable for injuries inflicted upon third persons."

The weight of authority is with the decision of the court in the principal case that an automobile is not a dangerous instrument within the rule of law now under consideration. *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (U. S.) 1130; *Jones v. Hoge* (Wash.), 92 Pac. 433; *Lewis v. Amorous* (Ga.), 59 S. E. 338. In the last case cited the court facetiously remarked: "It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While by reason of the pay allotted to judges in this state, few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like."

NOTES OF IMPORTANT DECISIONS.

COURTS—ORIGINAL JURISDICTION OF SUPREME COURTS LIMITED TO QUESTIONS PUBLICI JURIS AFFECTING THE SOVEREIGNTY OF THE STATE OR THE GENERAL WELFARE.—The statement of the proposition of law given as the subject heading of this annotation is rapidly becoming the prevailing rule, as we said it should so become in our exhaustive annotation on the subject of the original jurisdiction of Courts of Appeal in 67 Cent. L. J. 324. The latest authority to give absolute acceptance to this

doctrine is the Supreme Court of North Dakota in the recent case of *State v. Fabrick*, 117 N. W. 860, where it was held that the sovereignty or franchises of the state being not directly affected by proceedings for the division of a county, the Supreme Court will not interfere by mandamus to control the action of the county commissioners except under "unusual circumstances." This is the exception so often stated by Courts of Appeals to which we called attention in the annotation above referred to.

In the principal case the court declared the general rule as follows: "Merely private rights are not enough on which to base an application for the issuance of original writs by this court. The rights of the public must appear to be directly affected. The matters to be litigated must not only be publici juris, but the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people must be affected. Before the court will, in the exercise of its original jurisdiction issue prerogative writs, there must be presented matters of such strictly public concern as involve the sovereign rights of the state, or its franchises or privileges. The often quoted statement of the rule as to the original jurisdiction of the Supreme Court to issue writs of a prerogative character, as given in *Attorney General v. City of Eau Claire*, 37 Wis. 400, is well expressed and clear: "To warrant the assertion of original jurisdiction here the interest of the state should be primary and proximate, not indirect or remote; peculiar, perhaps, to some subdivision of the state but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character."

The principal case, however, was held to be one of the "exceptional" cases which do not come within the rule for the reason that unless the issue as to the proper submission of the question to be voted for at the 1908 election were determined on, this original hearing, the right to vote would be utterly lost for at least two years because of the necessary delays incident to the bringing of a suit through the ordinary channels of procedure. The court said on this point: "The matter of the division of a county is one of public importance to the people of the county. The statute gives the people a right to express a choice on that question. Inasmuch as the question must be voted on at the next succeeding election after the presentation of the petition to the commissioners, it is not improbable that delays or refusals by some official will cause the same situation in 1910 as now confronts

the petitioners. We are fully convinced that only matters of the gravest importance should be considered sufficient to warrant this court in issuing prerogative writs at the request of private relators. Nevertheless we deem the circumstances and conditions surrounding this case to show such a state of facts as to bring it within the exception to the general rule. By refusing to entertain the writ now, it is inevitable that a delay of two years will be occasioned. A delay for so long a period on a matter of this importance is a potent consideration in favor of taking jurisdiction. In view of the fact that an appeal to the Supreme Court can follow any decision of the district court in the case, we think the interests of justice demand that this court should act and dispose of the controversy now, and prevent further delay on a matter of such great consequence to the people of Ward county."

CONSTRUCTIVE CRIMES DEFINED.

The constitutional requirement of "due process of law," of course presupposes a "law" without which a conviction for crime could not be constitutional. In many ways and places I have endeavored to resurrect and revivify the old maxim, "Ubi jus incertum ibi jus nullum"—(where the law is uncertain there is no law). I have done this to the end that this maxim may be judicially declared to be a part of our constitutional conception of "law," as that word is used in the constitutional guarantee that no man shall be deprived of life, liberty or property, except by "due process of law."¹

In the essays just referred to in the note I justified with considerable elaboration the proposition that in the United States no man can be punished for mere constructive offenses. I have gone further and have attempted to formulate a statement of the

nature of law as viewed in the scientific aspect, in contradistinction to that arbitrary power which punishes constructive offenses, and I have undertaken to make a comprehensive discussion as to what is a constructive offense in relation to "due process of law." Here I will only undertake to summarize those conclusions, already justified in various ways.

Constructive Crimes Classified.—Constructive offenses naturally divide into two general classes. In the first of these the more direct responsibility for the prohibited constructions rests with the courts, and arises from the judicial engraftments made upon legislative enactments, and the second class includes those where the more direct responsibility for the evil primarily rests with the legislature for having attempted to construct a wrong, by penalizing conduct not in itself injurious, nor of injurious tendencies according to any known laws of the physical universe. These two general classes of constructive crime readily lend themselves to a further subdivision, according to the various conditions which conduce to such baneful punishments for mere constructive wrongs. These different sources of such error will now be pointed out with a little more system and elaboration, and it is believed that the following statements are justified by, and generalize all, that is included in the discussion and the authorities cited in the several articles above referred to. In what follows it will be necessary for the clarifying of our vision to subdivide still further the two general classes of constructive offenses, above referred to.

Judicial Legislation Under Pretense of Interpretation.—The first class of constructive offenses is best understood. Here the act under investigation is one which under any of the tests prescribed hereafter, may properly be penalized, but it is not within the plain letter of the prohibitive statute because the statutory tests of criminality, though certain in meaning and covering acts of the same general character, manifestly do not specifically include the con-

(1) For my discussions thereof see: "The Scientific Aspect of 'Due Process of Law,'" *Am. Law Review*, June 1908. "Concerning Uncertainty and 'Due Process of Law,'" *Cent. Law Jour.*, Jan. 3, 1908. "The Historical Interpretation of 'Law,'" *The Albany Law Jour.*, April, 1908. "Due Process of Law in Relation to Statutory Uncertainty and Constructive Offenses," *N. Y.* 1908, Pub. by The Free Speech League, 120 Lexington ave., N. Y. (This last booklet contains the three foregoing essays, and much more similar matter besides.)

duct under investigation. In such a case the judicial enlargement of the field plainly marked out by the statute is so universally recognized as improper, because judicial legislation, and therefore within the prohibited constructive offenses, as to need no argumentative support. Indeed, all our judicial rules for the strict construction of criminal statutes are founded upon the necessity of precluding judges from creating law.

The second class of constructive offenses is less perfectly understood. Here the act under investigation is again one which, under any of the tests prescribed hereafter, may properly be penalized, but the statutory language is ambiguous in its specification of the criteria of guilt. Such statutes, often seduce judges into an abuse of their power by a misapplication of rules of construction. Where the words descriptive of the crime are ambiguous, (open to several interpretations, some or all of which meanings, taken separately, are very certain in their application to all specific facts), it is erroneously assumed by many courts that it is an exercise of the judicial function of statutory interpretation to select that one among all the possible meanings of the statute which is to be enforced. I do not conceive it so. The judicially selected interpretation may not be the one which the legislature intended to enact. Certainly it has not received the specific sanction of the legislative branch of the government, any more than every other possible interpretation, and the only conduct which can with certainty be known to be within the legislative prohibition (that is, within *the law*) is those acts which are clearly within every possible meaning of the statute. If this rule has not been always observed in the matter of ambiguous statutes, it is because judges have not seen clearly the true relation between such ambiguity and *the law*, as a scientist must view it, nor the distinction between judicial legislation and judicial interpretation.

The third class of these prohibited con-

structive offenses is those where definitive description of the crime is wholly wanting (uncertainty as distinguished from mere ambiguity) because there is total absence of any certain, clear, universal and decisive tests of criminality. Then we have a case for the application of the old maxim: "Where the law is uncertain there is no law." In such a case if the court should supply the tests of criminality, so indispensable to the enforcement of every statute, those tests would not have the sanction of the legislative branch of the government, and therefore could not be *the law*, in any criminal case. Supplying these tests, or criteria of guilt, is therefore clearly a matter of judicial legislation, by means of statutory interpolation, as distinguished from interpretation, and punishment thereunder is punishment for a constructive offense, and not due process of law.

If in a criminal case a court should undertake to enforce upon any person a judgment which did not conform to general, uniform and certain rules of conduct having an exact, verbally-formulated existence, which is wholly created by the legislative department, and therefore existing outside the mere will of the court, and well known or easily accessible to all prior to the inception of the cause of action then before the court—I say, if a court should undertake to enforce anything different from such a law, it would not be enforcing *the law* at all, and to submit to such penalties would be submission to a government by the arbitrary and despotic will of the judiciary, and not in any sense would this be a government according to *law*, and this must always be the case where the statutory criteria of guilt are uncertain. Criminal punishment under such circumstances would be punishment for constructive crimes, and not due process of law.

Legislative Penalizing of Mere Constructive Injuries.—Fourth: It follows from the fact that human justice and a secular state, can only deal with material factors, that an offense to be real, and not merely construc-

tive, must be conditioned upon a demonstrable and ascertained material injury, or upon the imminent danger of such, the existence of which danger is determined by the known laws of the physical universe. Our constitution, both in its guarantee of freedom of speech and press, and in its guarantee of due process of law (as we must understand *the law*, according to the scientific view-point), precludes the construction of mere psychologic crimes. The offenses which are based only upon ideas expressed or otherwise, such as constructive treason, witchcraft, and heresy, either religious or ethical, and all kindred psychologic or other constructive crimes, are prohibited, because the very nature of *the law* whose supremacy and processes our constitution guarantees, is such that American legislators cannot be permitted to predicate crime upon mere psychologic factors. Manifestly this does not preclude punishment when these psychologic factors have ceased to be merely such, by having resulted in actual material injury as distinguished from constructive and speculative injury; for example, it does not preclude punishment in cases of personal libel, which has resulted in material injury or where the uttered opinion has resulted in actual crime. Under such circumstances as to make one an accessory before the fact, or as to prove a conspiracy to secure its commission.

Furthermore, if the state should be permitted to penalize an act which is not an essential element in doing violence to that natural justice which can deal only with material and physical factors, such a statute could not be one enacted in the furtherance of the governmental purpose to establish justice (material justice) and therefore such a law could not be within the legitimate province of such a government as we profess to maintain. Furthermore, such a statute, penalizing an act which is not an essential element in violating natural justice, must in itself be the creation of an injustice—that is, it must in itself and from its very nature, authorize an invasion of liberty, unwarranted by any ne-

cessity for defending natural justice, or maintaining the greatest liberty consistent with equality of liberty, and therefore the enforcement of such a statute would be the deprivation of liberty without due process of law, as we must understand "law" if we view it in the scientific sense. I conclude that every such statute as I have last hereinabove described is also an attempt to punish for a constructive offense—is a violation of our constitutional guarantee of due process of law.

Difficulty in the Application.—It hardly seems possible that there could be much conflict of opinion about the foregoing generalities. The differences of opinion I apprehend will arise chiefly when we come to make deductions therefrom for application to some particular statute, and the result comes in conflict with our moral sentimentalism. Under such circumstances we are all predisposed to error, because our emotions will necessarily blur our intellectual insight as to the difference between certainty in the very words of the statute, and a strong feeling certitude within us that the legislature must have means to prohibit exactly what *we feel* that they ought to have prohibited. Thus moved by our feelings, just to the extent that they are intense, we will be certain to read our feeling-convictions into the statutes, which often by reason of their very uncertainty, readily lend themselves to this dangerous and almost inevitable evil, of judicial penal-legislation. If this evil can be avoided it will only be because our intellectual development is of that superior order which dominates the feelings, without ever being overcome by them, and which at the same time enables us to possess an illuminated view of the point of contact and division between judicial (so-called) statutory construction, and a judicial usurpation of the legislative function, under the guise of statutory interpretation. These considerations seem to make it desirable that the foregoing principles be more elaborately restated with some special attention to the factors which necessarily imply unconstitu-

tional uncertainty and form the tests by which statutes will be adjudged to be uncertain, and consequently a nullity. Thus we will still further clarify our intellect and fortify ourselves against the dangerous, liberty-destroying tendency to punish for constructive offenses.

Penalizing Abstractions and Emotions.—If the legislative verbiage in a criminal enactment is so involved as to make its significance doubtful, or if the offense is bunglingly described by words which symbolize and generalize only a subjective (emotional) state, associated in the minds of different persons with a variety of mere, peculiarly personal, abstractions incapable of accurate, concrete definition, such as is uniformly applicable to every conceivable case, and decisive beyond all speculative doubt, then in either event, that enactment must be declared a nullity, because "where the law is uncertain there is no law." If courts were allowed to decide which of possible or conflicting descriptions is to be made effective and which annulled, or are allowed to create the criteria of guilt, when the legislature has failed to do so, this would be judicial legislation, because the legislature having furnished no exact material for definition, the courts can only declare that to be the law which its judges, in the exercise of legislative discretion, believe ought to be the law, (instead of deriving that legislative intent exclusively by deductions made from the legislative language); and therefore read it into the statutes and dogmatically declare the judge's will to have been the legislative intent.

The judicial power over criminal statutes must be limited to a mere redeclaration, or restatement of that which, to every intelligent person, is already definitely and clearly manifest from the actual words of the enactment, and from these alone. If it requires more than this to make the statute enforceable, or applicable to a particular case, then the statute is a nullity under the maxim: "Where the law is uncertain there is no law." To do less than this, for every word used in the enactment, or to do more

by importing and engrafting into a criminal statute facts and phrases not actually placed there by the legislative body, is again a judicial usurpation of the power to enact criminal legislation.

It follows that if those words, which alone are actually employed in the statute, do not unavoidably import such an exact definition, that every man of average intelligence, by the use of the statutory definition alone can determine with mathematical certainty, whether a particular act is a crime, (or a particular book is obscene) then the legislative body has failed to create a criminal "law," and the court being without legislative power, has nothing to execute, but must declare the pretended statute a nullity, because, "where the law is uncertain there is no law."

Statutory Words Must Symbolize Definite and Uniform Concepts.—Not quite identical with the foregoing proposition is this truism: The power of courts is limited to deductions made from the legislative words; that is, the general concept symbolized by the statutory words may be made concrete to determine if the specific act is necessarily included in the legislative general conception, as that is exclusively revealed in the legislative language: In other words, the court cannot create such a concept where the legislative word-symbols do not stand for definite concepts. That again would be judicial legislation, not interpretation, because, "where the law is uncertain there is no law," and a law which requires this to make it effective is void.

If courts can be credited with any power to construe penal statutes, the ambiguity which furnishes the occasion and subject-matter of construction, must be found solely in the word-symbols used in the criminal statutes, and not in the exercise of judicial legislative-power, under the guise of interpreting the indefinable nature of that which the legislative words in fact do symbolize. Any other rule would authorize arbitrary *ex post facto* judicial legislation and punishment, and where the legislative word-symbols do not stand for definite concepts,

the enactment is a nullity because "where the law is uncertain there is no law."

To clarify our minds let this be restated in another way. When the word-symbols descriptive of the crime do not stand for definite or concrete concepts, nor any sense-perceived, objective quality or activity of matter, of present or past existence, but represents to each individual, only a subjective relation between his own purely personal experience, or the abstractions made from them, and his purely personal emotions of approval or disapproval, then the words used to describe this subjective condition, because of its abstractions and emotional element, always making it personal and individual, must always elude accuracy of definition, and the law is void "because where the law is uncertain there is no law."

Whenever we neglect the requirement that every crime must be predicated upon some actual sense-perceivable and proven material injury, or the imminent danger of such determined to be imminent by the known laws of the physical universe, and therefore accurately definable and so defined in the statute; I say, whenever we abandon these requirements then we are condemning men on mere metaphysical speculations about unrealized psychologic tendencies, or according to the personal ethical sentimentalizing, whim, caprice, malice, etc., etc., on the part of those charged with the execution of the law, and thus the judge arrogates to himself the role of legislator, and under such enactments convictions are never secured according to the uniform express authority of any statute, and all such convictions inflict punishment, for mere constructive injuries, and are an unconstitutional deprivation of liberty and property because not "due process of law." This error, I repeat, is one easily made if we are but careless about the proper different attitudes of mind which should characterize our outlook upon penal statutes and those of a civil nature which only declare and enforce natural justice; or if our vision is clouded as to the difference be-

tween deductions made from the statutory phrases and our feeling-convictions, read into statutes, made hospitable thereto because uncertain, and therefore containing little or no limitation upon the reading-in process.

Under our system (especially that of the Federal Criminal law,) where legislative power is definitely placed, accurately limited, and incapable of transference to a jury, star-chamber, or any other department of government, and where in addition *ex post facto* laws are prohibited, it is manifest that the maxim against uncertainty in statutes must be treated as an inseparable, inalienable and inherent part of that liberty of the citizens which is guaranteed by every American constitution. Without certainty before the fact, as to what is the law in relation to it, there can be no such thing as "due process of law" in any conviction. If the criminal statute is uncertain, then courts and juries become legislators after the fact, if any enforcement of the statute is had.

It follows that if any American legislative body should create a crime without defining it, such enactment would be a nullity. Should an attempt be made to penalize the commission of "screw-loos-ibus," without defining the word, such a law would be unenforceable and void. It is intolerable that courts should resort to current history, and therefrom deduce meaning to be read into a penal statute whose words are devoid of all definiteness of meaning. By such a process the court might conclude that a legislature by "screw-loos-ibus" intended to penalize certain unpopular practices of christian scientists. If courts may thus speculate inductively from current history, personal emotions and prejudices, and read the result into penal statutes by dogmatically asserting that this or that was the legislative intent, then we have re-established judicial despotism. In the absence of a generally known and *accurately definable* meaning for the word, an enforcement of the law against "screw-loos-ibus" would necessarily involve the exercise of legislative power, by the court or

jury charged with its execution, and this enactment, by an unauthorized delegation of legislative power, must be specially made at each trial to cover only the acts then under investigation, and must always be *ex post facto*. For each of these reasons a law which in its practical administration necessarily involves such objections must be judicially annulled.

If a criminal law is so vague as to need interpretation, then it should be declared a nullity for uncertainty. Any other course necessarily involves on the part of the interpreting judge that as between all possible meanings he exercise his own legislative discretion and read the result into the legislative intent and phraseology. If the words to be interpreted symbolize emotions as their only element of unification, and therefore are incapable of accurate general definition, or if the materials for a judgment as to the applicability of the law to every conceivable case, are varying in different persons, then to allow judges or juries to interpret or apply such a doubtful statute is to admit their authority to enforce an *ex post facto* criteria of guilt; which is not public nor general, but of private origin in the court, and particular for each defendant.

These foregoing speculations suggest all that has occurred to me by way of specifying in general terms the principal sources of that outrageous remnant of absolutism, which so often results, even in our time and country, in the damnable practice of punishing men for mere constructive offenses. The motive for these wrongs is usually a stupid moral sentimentalism and self-righteousness, and often finding its roots in religious superstitions of the past. The remedy can only be found in securing judges whose intellectual development is such as to make them true scientists of the law, and who with clear intellectual insight shall combine that moral courage which will make them dare to resist the "moral" rant of a politically potent but intellectually bankrupt professional reformers. I am sure there are such judges, and that with

persistence and diligence they can be found.

The Standard of Certainty.—The standard of certainty and constitutionality is that a criminal statute to constitute "due process of law," must define the crime in terms so plain, and simple, as to be within the comprehension of the ordinary citizen, and so exact in meaning as to leave in him no reasonable doubt as to what is prohibited. Those qualities of generality, uniformity, and certainty, must arise as an unavoidable necessity out of the very letter of the definition framed by the law-enacting power, and not come as an incidental result, from an accidental uniformity in the exercise, by courts, of an unconstitutionally delegated legislative discretion. If a statute defining a crime is not self-explanatory, but needs interpretation, or the interpolation of words or tests to insure certainty of meaning in the criteria of guilt, then it is not *the law* of the land, because no such judicial test of criminality has ever received the necessary sanction of the three separate branches of legislative power, whose members alone are authorized and sworn to define crimes and ordain their punishment. Laws defining crimes are required to be made by the law-making branch of government because of the necessity for limiting and destroying arbitrariness and judicial discretion in such matters. That is what we mean when we say ours is a government by *laws*, and not by men. It follows that it is not enough that uniformity and certainty shall come as the product of judicial discretion, since "law" is necessary for the very purpose of destroying such discretion in determining what is punishable.

An Illustrative Application.—Let us briefly apply the foregoing test of constitutionality to our various laws against "obscene indecent, filthy or disgusting" literature or art. To constitute a valid criminal law the statute under consideration must so precisely define the distinguishing characteristics of the prohibited degree of "obscenity" that guilt may be accurately

and without doubt ascertained by taking the statutory description of the penalized qualities and solely by the tests of obscenity therein prescribed determine the existence of the prescribed criminal qualities in the physical attributes inherent in the printed page. Judicial tests of "obscenity" cannot be read into the statutory words. Nor can official or judicial speculations (of a character not calculated to discover such definitely penalized physical qualities in the book) be permitted, so long as they deal only with the mere unrealized psychologic potentiality, for influencing in the future some mere hypothetical person. Such speculative psychologic tendencies are never found with certainty in any book, but are read into it, with all the uncertainty of the *a priori* method, as an excuse for a verdict of guilty. Even if the legislative body attempted to authorize such a procedure it would be a nullity, under the maxim, "Where the law is uncertain there is no law." Therefore such procedure cannot be "due process of law." An unrealized psychologic tendency cannot be made the differential test of criminality, although for the sake of the argument we admitted that such tendency may properly appeal to the legislative discretion, and may properly result in penal laws wherein the statutes and not the courts, specify the tests, definite and certain, by which to determine what it is that is deemed to possess the criminal degree of such dangerous tendency.

It is for the legislature definitely and precisely to prescribe all the criteria of guilt by which to determine the existence of that which is prohibited, because of its immoral tendency, and no mere seeming necessity nor even by express language, and much less by vague implication derived from mere uncertainty, can it delegate to the judge or jury a legislative discretion for condemning, after the facts, according to its own arbitrary guess about the problematical psychological influence and a consequent immoral tendency of a book. For the foregoing reason all laws against "ob-

scene, indecent, filthy or disgusting" literature or art" are void, as not constituting "due process of law."

THEODORE SCHROEDER.

New York City.

RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION OF.

UNITED STATES v. ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

United States Circuit Court of Appeals, Eighth Circuit, August 22, 1908.

The safety appliance law of Congress, in the situations in which it is applicable, imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment for the defendant in a civil action to recover a penalty for an alleged violation of the safety appliance law of Congress embodied in Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Stripped of matters about which there is no controversy here, the violation charged consisted in hauling a car, in the usual course of transportation, when one of the couplers thereon was broken and inoperative, so that it could not be coupled or uncoupled without the necessity of a man going between the ends of the cars. The trial was to a jury, and the single question presented to us is whether or not the duty of the defendant, in respect of the maintenance of the coupler in an operative condition, was correctly stated in the portion of the court's charge, which reads: "The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. * * * And it is for you to determine in this case whether or not the defendant used reasonable care in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict in favor of the defendant; otherwise, you should find for the United States."

Applying to the evidence the law as so interpreted, the jury returned a verdict for the defendant, which the court declined to disturb upon a motion for a new trial. *United States v. Atchison, etc., Ry.*, (D. C.), 150 Fed. 442. That the interpretation of this law of Congress has been attended with difficulty is attested by many varying opinions in the reported cases, and that there are considerations tending to sustain the construction placed upon it by the District Court is attested by the opinion rendered upon the motion for a new trial and by the sustaining opinions in other cases, notably *St. Louis & S. F. Ry. Co. v. Delk* (C. C. A.) 158 Fed. 931; but, as we read the opinion of the Supreme Court in the more recent case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. —, s. c. 71 Ark. 445, 78 S. W. 220; 83 Ark. 591, 98 S. W. 959, it is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the non-liability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; it being said in that connection (page 294 of 210 U. S., page 620 of 28 Sup. Ct. 152 L. Ed., —): "In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry. v. Delk* [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employees reasonably safe tools, machinery, and appliances, or consider when or how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is prescribed. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just."

While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5, relating to drawbars, is the same as section 2, relating to couplers, and section 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

Because, in view of the later decision in the Taylor Case, the instruction before quoted did not embody a correct statement of the law, the judgment is reversed with a direction to grant a new trial.

NOTE.—Extent of Railroad's Liability for Failure to Comply with Provisions of the Federal Safety Appliance Act.—Many difficult questions have arisen concerning the proper construction of what is known as the safety appliance act, requiring railroads to equip all their rolling stock with automatic couplers and continuous brakes.

Liberal Versus Strict Construction.—While this statute is penal and in derogation of the common law, it is not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning. *Johnson v. Southern Pacific Co.*, 196 U. S. 1. Or in other words, a statute such as this, is to be construed so as to prevent the mischief and advance the remedy so far as the words fairly permit. *Chicago, etc., R. R. v. Voelker*, 129 Fed. 522.

But in the case of *United States v. Illinois Central R. R.*, 156 Fed. 182, the court held that the safety appliance act was a criminal statute and is to be construed as such and in suits by the government to inflict the penalty thereunder the offense must be proven beyond a reasonable doubt. It would seem, however, that in view of a recent decision of the supreme court (*Taylor Case*, 210 U. S. 281), this holding is erroneous.

The Question of Interstate Commerce.—What cars are engaged in interstate commerce, making necessary the equipment required by statute? The Supreme Court of the United States has held that a dining-car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the next trip. The argument here is that an "empty" or "idle" car standing in some "local" yard is not to be measured as to its interstate character by the same standards as determine the interstate commerce character of ordinary merchandise (116 U. S. 517), but a presumption of the interstate character of cars used by interstate carriers follows cars "used in moving interstate commerce, which have stopped temporarily in making its trip between two points in different

states." *Johnson v. Southern Pacific Co.*, 196 U. S. 1. See also *Voelker v. Railway Co.*, 116 Fed. 867, 70 L. R. A. 264, where the language of Justice Shiras in arguing that "empty" cars are within the meaning of the statute is specially quoted with approval by the supreme court in the *Johnson* case.

Where a car loaded with lumber and shipped from another state had not been delivered to the consignee at the time it was stopped in a railroad yard at destination and placed on a side-track for repairs to the automatic coupler, the stoppage in the yard was an incident to the transportation, so that the car was still engaged in interstate commerce within the meaning of the safety appliance act. *St. Louis & San Francisco R. R. Co. v. Delk*, 158 Fed. 931.

So also it has been held that the provision of the safety appliance act applies to a car designed for interstate traffic, though at the time being hauled "empty." *Voelker v. Railroad Co.*, 116 Fed. 867. See also *U. S. v. Ill. Cent. Ry. Co.*, 156 Fed. 182; *U. S. v. Railroad*, 162 Fed. 185. It is also held that a car destined for a distant point in another state is still in interstate commerce though transit may be temporarily suspended. *Chicago, etc., R. R. v. Walker*, 129 Fed. 522.

What are "Cars" Within the Meaning of the Act?—It has been held that locomotive engines are included by the words "any car" contained in the second section of the act. *Johnson v. Southern Pacific Co.*, 196 U. S. 1. The argument there is that although locomotives are also required by the first section of the act to be equipped with power driving wheel brakes, the rule that the expression of one thing excludes others does not apply, inasmuch as there was a special reason for that requirement and in addition the same necessity for automatic couplers existed as to them as in respect to other cars.

Style and Character of Couplings Used.—It has been held that the equipment of cars with automatic couplers which will not automatically couple with each other so as to render it unnecessary for men to go between the cars to couple and uncouple is not a compliance with the law. *Johnson v. Southern Pacific Co.*, 196 U. S. 1. See also: *U. S. v. L. & N. Railroad*, 162 Fed. 185. And it has also been held that this test, to-wit, whether the person operating the coupler is required to go between the ends of the cars, applies to the act of coupling as well as that of uncoupling. *Chicago, Milwaukee & St. Paul R. R. Co. v. Voelker*, 129 Fed. 522. In this last case the coupler had become so defective that the lever would not lift the pin from the socket and the knuckle could not be drawn open by leaning toward the coupler and using one hand, but required the presence of the operator's entire body between the ends of the cars.

It had also been held that under the act of 1893, requiring draw-bars, when cars are empty, to be $34\frac{1}{2}$ inches above the rails, with a maximum variation, loaded or unloaded, in the height downwards of 3 inches, does not require that the variation shall be proportioned to the loads or that a fully loaded car shall exhaust the entire variation. *St. Louis, etc., R. R. v. Taylor*, 210 U. S. 281.

It has been held that each car is to be considered separately and shall each be equipped with automatic couplers in operative condition at both ends. *U. S. v. Philadelphia, etc., R. R.*, 160 Fed. 696.

Subsequent Care, Repair and Operation, of Couplings.—Some difference of opinion exists on this phase of the question. It has been held that while the safety appliance act imposes on the carrier the absolute duty of equipping its cars with automatic couplers in the first instance, and thereafter keep them so equipped, the carrier is only required to use reasonable care, after the cars have been so equipped, to keep such couplers in repair. *St. Louis & San Francisco R. R. Co. v. Delk*, 158 Fed. 931. To same effect: *Missouri, etc., R. R. v. Brinkmeier (Kans.)*, 93 Pac. 621.

But it has also been held that this duty is an absolute one and that it is not a defense that defendant exercised reasonable care and diligence to keep the coupling apparatus on its cars in repair. *United States v. Southern Railway Co.*, 135 Fed. 122. It was further held in this case that, placing an "M. C. B." defect card upon a car, and noting on such car defects forbidden by the safety appliance act which is notice to all connecting lines that the defendant sent the car out defective, and that other lines using the car would not have to account to defendant for the defects noted is a deliberate violation of the statute and a defiance of the law.

The case of *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 150 Fed. 442, takes the opposite position, holds that this act being penal should not be strictly construed against the defendant and that a mere failure of defendant railroad company's inspectors on first inspecting the car before delivering it to a connecting carrier to discover that the chain attached to the lever by which the automatic coupler was broken, the same having been discovered and repaired on a subsequent inspection before delivery to the connecting carrier, did not constitute a violation of the act.

It is well to distinguish the last two cases, where the United States sues to recover the penalty provided for failure to keep couplers on cars used in interstate traffic in repair, and cases like the *Voelker* case, which is a suit for personal injuries occasioned by the use of such defective couplers. In the first case no one is injured and the courts seem inclined not to impose the duty in such a case as an absolute one, while in the second class of cases the fact that the cause of the injury was the defective coupler is sufficient to hold the defendant liable.

The rule is otherwise stated as follows: Where an automatic coupler is out of repair for a length of time reasonably sufficient to have it repaired, the railroad is absolutely liable for all injuries which may occur. *Elmore v. Railroad*, 130 N. Car. 506. Otherwise, not. *United States v. Ill. Cent. Ry. Co.*, 156 Fed. 182.

It would seem, however, that this question has been settled by the supreme court in the recent case of *St. Louis, etc., R. R. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, where it was distinctly held that the safety appliance act supplants the common law rule of reasonable care on the part of the employer as to providing the appliances defined and specified therein, and imposes on interstate carriers an absolute duty, under which duty the defense of reasonable care is unavailable. See also to same effect: *U. S. v. Railroad*, 162 Fed. 405.

Where cars become defective while moving interstate traffic, the railroad must use reasonable diligence to discover the defects and repair same

at once or at the nearest point where it can be done. *U. S. v. Great Western Ry. Co.*, 162 Fed. 1052. It has been held that where there has been a "rest" for one hour, the railroad is negligent in again moving the car without repairing coupler. *United States v. Philadelphia, etc., R. R.*, 160 Fed. 696.

In regard to the operation of proper couplings it has been held that the safety appliance act cannot be construed so as to require that the equipment shall in fact be efficiently operated by those in charge of the train.

Proximate Cause, Assumption of Risk and Other Defenses.—It has been held that the failure to equip a car with a coupler, coupling automatically, by reason of which a car coupler was obliged to go between the cars, is a proximate cause of the accident, though the cars were forced together by the negligent kicking of other cars against them. *Voelker v. Railroad*, 116 Fed. 867.

On the question of assumption of risk it is to be noted that the act itself (sec. 8), specially provides that one injured by a defective coupler shall not be deemed to have assumed the risk though he continue in the employment of the railroad company after knowledge of the use of such defective couplers. Under this section it has been held that a switchman engaged in handling a freight car having a defective coupler, on a track principally used for handling freight trains, though sometimes used to handle cars in need of repairs, did not assume the risk arising from the defect in the coupler; the car not having been marked or isolated as one in bad repair, and its movement at the time not being with a view to its isolation or repair. *Chicago, etc., R. R. v. Voelker*, 129 Fed. 522.

In regard to the defense of contributory negligence, it is to be observed that the failure to equip or keep in repair automatic couplers on all rolling stock amounts to a continuing negligence on the part of the railroad company and that therefore there can be no contributory negligence which will discharge its liability to an employee injured while coupling such defective cars. *Elmore v. Railroad*, 130 N. Car. 506.

ject. The late Mr. Justice Pinney wrote the decision for the court, which was unanimous.

Very truly yours,

DUANE MOWRY.

Milwaukee, Wis.

JETSAM AND FLOTSAM.

WHERE THE CAUSE OF ACTION RETURNS TO LIFE.

Through the courtesy of one of our esteemed correspondents, we publish below a motion to dismiss a suit on an insurance policy filed November 17, 1908, in the District Court of Wapello County, Iowa, to-wit:

Comes now Smith & Lewis, attorneys for plaintiff, and shows to the court that this is an action upon a life insurance policy based upon the belief that the assured, Andrew Olson, was dead. As shown in the petition he had disappeared from Ottumwa some thirteen years ago, and for the past eight or ten years he has not been heard from and his whereabouts unknown; diligent search had been made for him without results, and so plaintiff concluded that he had passed to that bourne whence no traveler returns. She caused letters of administration to issue upon his estate as dead and brought this action, but the said Andrew Olson is not dead at all, though this court has solemnly recorded that he was dead. In short, the said Andrew has returned from the said bourne and is here on earth in the flesh, and so far as we can see he is likely to continue in this vale of tears for many moons to come. Under these circumstances it would be hard for us to convince a jury that the plaintiff should recover. In fact, she does not want to recover. To confess, she is the first client that we have ever had to sincerely rejoice at defeat. And now we ask leave of court to dismiss this case without prejudice to our rights to reinstate at some future time, should that time ever come when we are cock sure that Andy is dead.

SMITH & LEWIS.

CORRESPONDENCE.

SUPERIOR RIGHT OF PARENT TO CUSTODY OF MINOR CHILD.

Editor of the Central Law Journal:

Apropos of your editorial on the "Superior Right of a Parent to the Custody of a Minor Child" found in your issue of the 11th instant, let me refer your readers to an interesting and comprehensive discussion of the whole subject by the Supreme Court of Wisconsin, reported in the case of *Merkwell v. Pereles* and found in the 95 Wis. 406. In that case it appeared that the father was of apparent ample financial ability to support his child. And the fact that the father was of a cold and unsympathetic nature could not, in the mind of the court, operate to deny him the custody of his child.

The relation of parent and child with particular reference to the custody of the child, is treated exhaustively. So much so that the case must be regarded as a leading one on the sub-

HUMOR OF THE LAW.

Judge—Mr. State's Attorney, before you can introduce this witness you must show the loss of the record.

State's Attorney—I presume your honor was aware of the fact that the records of Marion County were burned.

Judge—As a private citizen I do know the fact, but as the court I do not, and you must put the proof of the fact into your case.

State's Attorney—Well, your honor, it strikes me a little singular that your honor knows something off the bench, and don't know anything on it.

"What are they moving the church for?"

"Well, stranger, I'm mayor of these diggin's, an' I'm fer law enforcement. We've got an ordinance what says no saloon shall be nearer than three hundred feet from a church. I give 'em three days to move the church."

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

Arkansas.....	3, 25, 27, 39, 45, 47, 54, 73, 81, 90, 102, 103, 105, 111, 112, 119, 123.
California.....	58, 117
Florida.....	36, 49, 92, 93, 97
Illinois.....	56
Indiana.....	40, 80, 110
Iowa.....	24, 26, 62
Louisiana.....	4
Massachusetts.....	2, 6, 17, 29, 33, 34, 37, 59, 79, 106, 113, 115, 120.
Michigan.....	28, 122
Minnesota.....	31, 114
Missouri.....	5, 7, 8, 23, 48, 57, 63, 70, 75, 76, 77, 85, 94, 96.
Nebraska.....	78
Nevada.....	67, 74, 104
New York.....	1, 21, 22, 32, 42, 55, 68, 95, 98, 118, 121
Oregon.....	46, 51, 61, 66, 83, 99, 101, 109
South Dakota.....	71
Texas.....	11, 13, 30, 38, 44, 50, 53, 60, 64, 65, 72, 82, 108, 116, 124, 125.
United States C. C.....	41, 84, 87
U. S. C. C. App.....	14, 15, 19, 43, 89, 107
United States D. C.....	9, 10, 12, 16, 18, 20, 69
Utah.....	88
Washington.....	35, 52, 86, 91, 100

1. **Appeal and Error—Excessive Damages.**—Where the damages for personal injuries are excessive, the court may reverse unless plaintiff will stipulate to reduce the verdict.—*Weinert v. Merchants' & Shippers' Warehouse Co.*, 112 N. Y. Supp. 123.

2. **Hypothetical Questions.**—Exclusion of hypothetical questions to expert witness held to be presumed to be prejudicial error, where both parties below assumed that the answer would be favorable to the party asking the question.—*Ross v. Schrieves*, Mass., 85 N. E. Rep. 468.

3. **Offer of Proof.**—Error cannot be predicated on the refusal of the court to permit witnesses to answer as to particular matter, where no offer was made to show what the witnesses would answer.—*St. Louis Southwestern Ry. Co. v. Myzell*, Ark., 112 S. W. Rep. 203.

4. **Suspensive Appeal.**—Where a suspensive appeal is allowed from a judgment for money, and it is dismissed for failure to furnish bond, no appeal from the judgment of dismissal can suspend the execution of the judgment originally appealed from.—*Reynolds v. Egan*, La., 47 So. Rep. 371.

5. **Verdicts.**—Where the trial court approves the amount of a verdict, the appellate court will not disturb it if not grossly disproportionate to the injury.—*Gerhart v. Metropolitan St. Ry. Co.*, Mo., 112 S. W. Rep. 12.

6. **Assignment for Benefit of Creditors.**—Sale by Trustees.—That trustees under a deed and assignment for the benefit of creditors did not advertise the property held no ground for avoiding their sale.—*Whitman v. McIntyre*, Mass., 85 N. E. Rep. 426.

7. **Attorney and Client.**—Compensation for Services Rendered.—If an attorney's compensation is stipulated, and he without just cause abandons his client before the proceeding for which he was employed has been conducted to a termination, he forfeits his right to compensation for services rendered.—*Young v. Lanznar*, Mo., 112 S. W. Rep. 17.

8. **Bailment.**—Gratuitous Bailment.—A deposit of \$1,000, made by plaintiff with his brother, placed in an envelope marked as plaintiff's prop-

erty and put in a safe is a gratuitous bailment, entailing no liability except for gross negligence.—*Stevens v. Stevens*, Mo., 112 S. W. Rep. 35.

9. **Bankruptcy.**—Agreements Made Before Four Months Period.—The fact that a transfer of property by a bankrupt to a creditor to be applied on an antecedent debt made within four months prior to the bankruptcy, was pursuant to an agreement made before the four-month period, will not prevent its recovery by his trustee.—*Vitzthum v. Large*, U. S. D. C., N. D. N. Y., 162 Fed. Rep. 685.

10. **Concealment of Property.**—The omission by a bankrupt from his schedules, under advice of counsel, of property claimed by another and the ownership of which was at least doubtful, cannot be held to be such a fraudulent concealment as to bar his right to a discharge.—*In re Alleman*, U. S. D. C., N. D. Pa., 162 Fed. Rep. 693.

11. **Discharge.**—A discharge in bankruptcy not pleaded as a defense in a suit involving liabilities cut off by the discharge held not a defense to the execution sale under a judgment rendered in such suit.—*Stone v. Schneider-Davis Co.*, Tex., 112 S. W. Rep. 133.

12. **Exemptions.**—Under Code Civ. Proc. Neb. sec. 530, a bankrupt who is a dealer in eggs and poultry is entitled to hold as exempt as tools and instruments of his business a horse, harness, and wagon used in gathering such produce, and the appliances necessary to be used in conducting his business.—*In re Conley*, U. S. D. C., D. Neb., 162 Fed. Rep. 806.

13. **Exemptions.**—Furniture, such as dishes, counters, stools, ranges, and the like, used in conducting a restaurant, is not exempt from forced sale under Rev. St. 1895, art. 2397, subd. 3, exempting all "tools, apparatus and books, belonging to any trade or profession."—*Stone v. Schneider-Davis Co.*, Tex., 112 S. W. Rep. 133.

14. **Frivolous Appeal.**—A second appeal in a bankruptcy proceeding, raising the same question determined in a former appeal, would be dismissed as frivolous.—*In re Kehler*, U. S. C. of App., Second Circuit, 162 Fed. Rep. 674.

15. **Involuntary Proceedings.**—A court of bankruptcy held to have jurisdiction to proceed with the hearing of a petition in involuntary bankruptcy where the alleged bankrupt failed to comply with orders for the amendment of pleadings, or to appear in response to an order to show cause.—*Young & Holland Co. v. Brande Bros.*, U. S. C. C. of App., First Circuit, 162 Fed. Rep. 663.

16. **Jurisdiction.**—A District Court as a court of bankruptcy has jurisdiction of a suit in equity by a trustee in bankruptcy of a corporation against a number of defendants to recover unpaid subscriptions to the stock of the corporation; such suit being one which could not have been maintained by the bankrupt.—*Skillin v. Magnus*, U. S. D. C., N. D. N. Y., 162 Fed. Rep. 689.

17. **Preferences.**—Release of a bankrupt's right of redemption from a deed to land which was in fact a mortgage, where the value of the land was less than the amount of the debt, held not to create a fraudulent preference.—*Sears v. Gilman*, Mass., 85 N. E. Rep. 466.

18. **Provable Debts.**—A note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consider-

ation, and may be proved as a debt in a second bankruptcy proceeding.—*In re C. H. Bennett Shoe Co.*, U. S. D. C., D. Conn., 162 Fed. Rep. 691.

19.—Questions Not Raised at Trial.—The capacity of a bankrupt's trustee to sue, not having been challenged in the trial court, cannot be raised on appeal.—*Knapp v. Milwaukee Trust Co.*, U. S. C. C. of App., Seventh Circuit, 162 Fed. Rep. 675.

20.—Surcharging Account.—A receiver in bankruptcy held properly surcharged with the amount realized from the sale of fixtures of one of the bankrupt's places of business, but not for the value of supplies on hand, nor for the difference between the appraised and sale value of the fixtures in another place of business belonging to the estate.—*In re Consumers' Coffee Co.*, U. S. D. C., E. D. Pa., 162 Fed. Rep. 786.

21. **Banks and Banking**—Forged Checks.—Where a party forging a check was a stranger to the drawee and the person receiving the money on the check, and they were equally innocent, the drawee must stand the loss.—*Trust Co. of America v. Hamilton Bank of New York City*, 112 N. Y. Supp. 84.

22. **Bills and Notes**—Bona Fide Purchaser of Forged Note.—Where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one holding under such forged indorsement may be recovered.—*Trust Co. of North America v. Hamilton Bank of New York City*, 112 N. Y. Supp. 84.

23.—Notice of Dishonor.—An owner of a note who has placed the same with another for collection held not bound either to personally notify the indorser of dishonor, or to make inquiries as to where the indorser received his mail.—*Vogel v. Starr*, Mo., 112 S. W. Rep. 27.

24. **Boundaries**—Establishment.—Where a lost corner cannot be definitely established by other means, the original location, as shown by surveys based on other established corners of the same original survey, should control.—*Leathers v. Oberlander*, Iowa, 117 N. W. Rep. 30.

25. **Carriers**—Contributory Negligence.—In an action for injury to a passenger caused by a jerking of a caboose, whether she was guilty of contributory negligence in going out on the back platform held for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Richardson*, Ark., 112 S. W. Rep. 212.

26.—Emergency.—In the sudden and unexpected starting of a street car while a passenger is attempting to board, there is presented an emergency; an "emergency" being a sudden or unexpected happening or occasion calling for immediate action.—*Burger v. Omaha & C. B. St. Ry. Co.*, Iowa, 117 N. W. Rep. 35.

27.—Liability as Warehouseman.—Where goods are delivered to a carrier not for immediate transportation, the carrier's liability is measured by the principles governing a depositary or bailee.—*St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock*, Ark., 112 S. W. Rep. 154.

28. **Chattel Mortgages**—Seizure of Intermingled Logs.—Where a mortgagee of logs seized the mortgaged logs and others belonging to another, it was not liable to the mortgagor or his assignee for any of its acts with reference to the logs not mortgaged.—*Croze v. St. Mary's Canal Mineral Land Co.*, Mich., 117 N. W. Rep. 81.

29. **Compromise and Settlement**—Validity of Agreement.—Validity of contract of compromise by which disinherited heir promised not to contest will in consideration of sharing estate held not to depend upon showing that the disinherited heir had a fair chance of success in contesting the will.—*Blount v. Dillaway*, Mass., 85 N. E. Rep. 477.

30. **Constitutional Law**—Construction.—Where a statute or constitution, after having been construed, is re-enacted without material change, such construction becomes a part thereof.—*Pittman v. Byars*, Tex., 112 S. W. Rep. 102.

31.—Delegation of Legislative Powers.—Laws 1905, p. 408, c. 273, authorizing detachment of agricultural lands from villages, held unconstitutional as a delegation of legislative power to the courts.—*In re Brenke*, Minn., 117 N. W. Rep. 157.

32.—Due Process of Law.—Code Civ. Proc. Sec. 438, authorizing substituted service in an action against a foreign corporation, is not a violation of Const. U. S. Amend. 14, as not due process of law.—*Grant v. Greene*, 111 N. Y. Supp. 1039.

33.—Regulation of Insurance.—St. 1907, p. 895, c. 576, Sec. 75, held not unconstitutional as conferring on the insurance commissioner power to pass on forms of insurance policies to be issued in the state.—*New York Life Ins. Co. v. Hardison*, Mass., 85 N. E. Rep. 410.

34. **Contracts**—Breach of Contract.—Plaintiff, though declaring on a building contract, may recover only on the account annexed, and defendant not having been deprived of the protection and benefit of the contract, the amount recoverable is limited to the agreed price, after deducting payments and damages suffered because of plaintiff's breach.—*Norcross Bros. Co. v. Vose*, Mass., 85 N. E. Rep. 468.

35.—Stipulations in Building Contracts.—Where a remedy for the happening of a condition has been provided for in the contract, the presumption is that the parties intended the prescribed remedy as the sole remedy.—*Goss v. Northern Pac. Hospital Assn. of Tacoma*, Wash., 96 Pac. Rep. 1078.

36. **Corporations**—Articles of Incorporation.—Articles authorizing a corporation to engage in the business of rendering public service in the municipality do not authorize the corporation to use privileges and franchises that may be conferred by the municipality.—*State v. Tampa Waterworks Co.*, Fla., 47 So. Rep. 358.

37.—Sale of Stock.—Where the seller of corporate stock guaranteed "that the liabilities of said" company "do not exceed by more than \$100" a certain amount, he was liable thereon for the amount of the excess of liabilities over that set forth less \$100.—*Childs v. Krey*, Mass., 85 N. E. Rep. 442.

38.—Unpaid Stock Subscription.—The unpaid subscriptions of corporate stock form a part of the assets of the corporation to which the holders of its bonds may look for satisfaction of their claims.—*United States & Mexican Trust Co. v. Delaware Western Const. Co.*, Tex., 112 S. W. Rep. 447.

39. **Costs**—Tender.—A justice's docket held to show a valid tender so that on plaintiff's failure to recover more than the sum tendered on an appeal to the circuit court costs should have been taxed against him.—*Shafstall v. Downey*, Ark., 112 S. W. Rep. 176.

40. **Counties**—Liability for Torts.—A county is not liable for the tortious acts of its officers even when engaged in the performance of their

duties, unless made so by statute.—*Talbott v. Board of Com'rs. of St. Joseph County, Ind.*, 85 N. E. Rep. 376.

41. **Courts**—Priority of Jurisdiction.—A federal court of equity which has acquired jurisdiction to administer the property of an insolvent corporation by taking possession of the same by its receivers in an appropriate suit is not deprived of such jurisdiction by a subsequent dissolution of the judgment of a state court.—*Robinson v. Mutual Reserve Life Ins. Co.*, U. S. C. C., S. D. N. Y., 162 Fed. Rep. 794.

42. **Transitory Actions**.—The courts of New York are open to all suitors, and will enforce transitory rights of action where the liability asserted is recognized by the common law, is contractual in its nature, and is not violative of the state's public policy.—*Hutchinson v. Ward*, N. Y., 85 N. E. Rep. 890.

43. **Criminal Law**—*Res Gestae*.—In a prosecution for perjury in support of W.'s homestead claim, declarations of W. indicating nonresidence during the time defendant testified W. continuously resided on the homestead was admissible as *res gestae*.—*Barnard v. United States*, U. S. C. C. of App., Ninth Circuit, 162 Fed. Rep. 618.

44. **Criminal Trial**—Degree of Offense.—Where a person is acquitted of a higher grade of an offense, such acquittal only bars a subsequent conviction for the degree of the offense for which he was acquitted on any higher grade.—*Burnett v. State*, Tex., 112 S. W. Rep. 74.

45. **Curtsey**—Equity of Redemption.—A husband has curtesy of trust as well as of legal estates and of an equity of redemption in mortgaged premises.—*Jackson v. Beckett Printing and Book Mfg. Co.*, Ark., 112 S. W. Rep. 161.

46. **Damages**—Action for Breach.—In an action for breach of defendant's contract to furnish plaintiff with motive power to operate his threshing machine during the season, testimony as to what plaintiff would have earned if he had been furnished power as agreed held admissible under the allegations of the complaint.—*Hoskins v. Scott*, Or., 96 Pac. Rep. 1112.

47. **Punitive Damages**.—The element of willfulness or conscious indifference to consequences from which malice may be inferred is necessary to sustain an action for punitive damages.—*St. Louis Southwestern Ry. Co. v. Myzell*, Ark., 112 S. W. Rep. 203.

48. **Dedication**—Reversion.—Where land has been dedicated to the public for cemetery purposes, if there be an abandonment of the graveyard, the right of the public, which is in the nature of an easement, ceases, and the land reverts to the original owner or his grantees.—*Tracy v. Bittle*, Mo., 112 S. W. Rep. 45.

49. **Dismissal and Nonsuit**—Setting Aside Dismissal.—The court has the power to review the action of the clerk in entering a dismissal, and if plaintiff was not in default in serving a copy of the cause of action the court may vacate the order of dismissal and reinstate the cause.—*Poppell v. Culpepper*, Fla., 41 So. Rep. 351.

50. **Divorce**—Custody of Children.—A judgment of divorce awarding to the wife the custody of the children held a mere judicial determination that she shall have the preference legal right to their custody.—*Sykes v. Speer*, Tex., 112 S. W. Rep. 422.

51. **Desertion**.—It is essential to desertion

as a ground for divorce that the deserted one has not acquiesced in the separation and that it is against his sincere desire.—*Luper v. Luper*, Or., 96 Pac. Rep. 1099.

52. **Disposition of Property**.—A married woman abandoned by her husband held entitled to acquire a domicile elsewhere than in the state where their domicile was at the time of her abandonment and obtain a divorce in the courts of such new domicile.—*Buckley v. Buckley*, Wash., 96 Pac. Rep. 1079.

53. **Homestead**.—The duty of a husband to support his children, notwithstanding a divorce awarding to the wife the custody of the children, held to constitute the husband and children, when living together, a family entitled to a homestead.—*Sykes v. Speer*, Tex., 112 S. W. Rep. 422.

54. **Ejectment**—Defenses.—A landowner who stands by and sees a railroad constructed on his land by a company having the power of eminent domain without preventing the construction acquiesces therein and cannot recover the land in ejectment.—*Union Sawmill Co. v. Felsenthal Land & Townsite Co.*, Ark., 112 S. W. Rep. 205.

55. **Eminent Domain**—Injury to Surrounding Land.—The use of soft coal in a municipal pumping plant, to the serious injury to property in the neighborhood, held to constitute an appropriation of such property for which the owners thereof may recover damages.—*Gordon v. Village of Silver Creek*, 112 N. Y. Supp. 54.

56. **Equity**—Scope of Review.—Where a master properly itemized his claim for taking testimony, but made a further claim for "hearing arguments and examining questions in issue and reporting conclusions thereon," the latter claim was improperly allowed, in that it failed to show the time necessarily employed.—*Wirzbicki v. Dranicki*, Ill., 85 N. E. Rep. 396.

57. **Estoppel**—Bills and Notes.—In an action by a wife for conversion of a note, payable to her and transferred by her husband without her authority, held, that she was not estopped to claim the note.—*McMahon v. Welsh*, Mo., 112 S. W. Rep. 43.

58. **Evidence**—Speed of Automobile.—Where a witness noticed the speed of an automobile when about one hundred feet from the place where it collided with a bicyclist, his testimony that it was then going at a lively gait was not incompetent on the question of the speed of the automobile at the place of collision.—*Olsen v. Levy*, Cal., 97 Pac. Rep. 76.

59. **Value of Property**.—Upon the question as to the value of certain property, an expert witness whose business was determining the value of similar property, and trading in it, could be examined as to values by hypothetical questions, though he never saw the particular property.—*Ross v. Schrieves*, Mass., 85 N. E. Rep. 468.

60. **Execution**—Validity of Sale.—The failure of an execution to state correctly the amount of the judgment and the costs is an irregularity which may justify the setting aside of the sale when sought in a direct action for that purpose, but does not render the sale void, and it cannot be attacked collaterally.—*Sykes v. Speer*, Tex., 112 S. W. Rep. 422.

61. **Executors and Administrators**—Settlement of Claims.—At common law an executor and administrator has absolute power of disposal of the personal effects of decedent and

may compromise any claim.—*Olston v. Oregon Water Power & Ry. Co.*, Or., 96 Pac. Rep. 1095.

62. **Fraud**—Evidence.—Where, in an action for fraud, there was no proof that the representations made were not literally true, or that stock for which certain notes were given was not worth its face value or that the notes were misapplied, plaintiff could not recover.—*Sheets v. Christie*, Iowa, 117 N. W. Rep. 29.

63.—Means of Knowledge of Parties.—The rule that mere false assertions as to the value of property, where no warranty is intended, does not constitute actionable fraud, does not apply where the parties have not equal opportunities to form and exercise their own judgment.—*Fall v. Hornbeck*, Mo., 112 S. W. Rep. 41.

64. **Habeas Corpus**—Conclusiveness.—A judgment on first application for habeas corpus to obtain custody of a child held not res judicata of a second application where there has been a material change of facts.—*Pittman v. Byars*, Tex., 112 S. W. Rep. 102.

65. **Homicide**—Communicated Threats.—If threats alleged to have been made by one person against another are communicated to the other, though not true, and he believes them and that the person made them, he will be justified in acting the same as if they had been in fact made.—*Huddleston v. State*, Tex., 112 S. W. Rep. 64.

66.—Dying Declarations.—To render a statement of a decedent competent as dying declaration, it is not necessary to show that he expressed a belief in the near approach of death, where his condition of mind is made apparent from his conduct and surrounding circumstances.—*State v. Ju Nun*, Or., 97 Pac. Rep. 96.

67. **Husband and Wife**—Community Property.—Where community property was used as a lodging house, the fact that the wife was attending to the business, with the approval of the husband, did not confer on her the power to sell the furniture or rent the premises.—*Travers v. Barrett*, Nev., 97 Pac. Rep. 126.

68. **Indictment and Information**—Joinder of Offenses.—Where a crime may be committed by the doing of several acts in the alternative, they may all be included in one count, and a conviction had on proof of the commission of any one, without proof of the commission of the others.—*People v. Schlessel*, 112 N. Y. Supp. 45.

69. **Internal Revenue**—Liquor Dealers.—Each member of a so-called "Locker Club," illegally licensed by a municipal corporation in Georgia, and which in fact sells or furnishes liquors to its members in violation of the prohibition law of the state, is a retail liquor dealer within the meaning of the internal revenue law, and subject to the penalty for its violation.—In re Charge to Grand Jury, U. S. D. C., S. D. Ga., 162 Fed. Rep. 736.

70. **Interstate Commerce**—Original Packages.—Where the original packages containing dairy products consisting of interstate shipments are broken, and the products are sold in different packages from those in which they were shipped into the state, the transactions are changed from interstate to intrastate commerce, and become subject to state laws.—*City of St. Louis v. Wortman*, Mo., 112 S. W. Rep. 520.

71. **Intoxicating Liquors**—Civil Damage Laws.—Whether person to whom liquor was sold in violation of civil damage laws was intoxicated at the time he committed suicide held immaterial, where the sale was the cause of suicide.

—*Palmer v. Schurz*, S. D., 117 N. W. Rep. 150.

72.—**Illegal Contracts**—The price of intoxicating liquors held not recoverable where the liquors were sold to be retailed in violation of law.—*Dallas Brewery v. Holmes Bros.*, Tex., 112 S. W. Rep. 122.

73. **Judgment**—Conclusiveness.—A judgment of the circuit court affirming a probate judgment adjudging a guardian to be indebted to his ward cannot be attacked collaterally on his appeal from a judgment on his bond superseding the probate judgment.—*Hands v. Haughland*, Ark., 112 S. W. Rep. 184.

74. **Landlord and Tenant**—Agreement by Lessor.—Where a lease was given for a term with the privilege of renewal, the lessee having power to sublet. If the lessor joined in a sublease of a part of the premises with privilege to the subtenant of renewal, the sublease could be enforced against the lessor and his successor in interest.—*Marino v. William*, Neb., 96 Pac. Rep. 1073.

75.—**Right to Sue For Rent**—A landlord's warranty deed assigns whatever right he has as landlord in the letting of the premises, and if the tenant continues to occupy under the tenancy the grantee may sue for the rent under the original letting.—*Starbuck v. Avery*, Mo., 112 S. W. Rep. 33.

76. **Libel and Slander**—Privileged Communications.—The headlines of a newspaper publication of the report of judicial or quasi judicial proceedings are not a part of the proceedings, but are the voluntary statements of the publisher.—*Brown v. Globe Printing Co.*, Mo., 112 S. W. Rep. 462.

77.—**Reports of Legal Proceedings**—A publication of privileged words of comment in a legal proceeding held not privileged.—*Brown v. Publishers: George Knapp & Co.*, Mo., 112 S. W. Rep. 474.

78. **Limitation of Actions**—Accrual of Right of Action.—Limitations do not run against warrants issued by a municipal corporation payable out of a special fund to be created until the fund has been created, and there is money in it with which to pay the warrants.—*Rogers v. City of Omaha*, Neb., 117 N. W. Rep. 119.

79.—**Defenses**—If a limitation merely affects the remedy, it must be pleaded in the answer, but, if it is a condition of plaintiff's right of action, defendant may take advantage of a failure to plead compliance to do so under a general denial.—*McRae v. New York*, N. H. & H. R. Co., Mass., 85 N. E. Rep. 425.

80. **Marriage**—What Constitutes.—A cohabitation illicit in its origin is presumed to be of that character unless the contrary is proved, and cannot be transferred into matrimony by evidence falling short of establishing the fact of an actual contract of marriage.—*Compton v. Benham*, Ind., 85 N. E. Rep. 365.

81. **Master and Servant**—Assumed Risk.—A switchman continuing to work for about a year with knowledge of defect in the roadbed held to have assumed the risk in the absence of a promise to repair.—*St. Louis, I. M. & S. Ry. Co. v. Mangan*, Ark., 112 S. W. Rep. 168.

82.—**Defective Machinery**—A servant thoroughly experienced in the work, who continues to operate a defective machine, without promise on the part of the master of guaranty against injury or of mending the machine, assumes the risk, where he has full knowledge of the defect and of its effect on the operation of the machine.—*Continental Oil & Cotton Co. v. Scott*, Tex., 112 S. W. Rep. 107.

83.—**Fellow Servants.**—Where the hook tender who attached hooks for the purpose of raising the log which fell on plaintiff, and the operator of the crane by which it was raised, were mere operatives, charged with the performance of no positive duty which the master owed to plaintiff, they were fellow servants of plaintiff, for whose negligence the master was not liable.—*Allen v. Standard Box & Lumber Co., Or.*, 96 Pac. Rep. 1109.

84.—**Fellow Servants.**—A telegraph operator in charge of a block signal, and in absolute control of the operation of trains within such block, held a vice principal, and not a fellow servant, of a trainman killed in a collision due to the operator's negligence in permitting a train to proceed while the block was occupied.—*Salmons v. Norfolk & W. Ry. Co., U. S. C. C., S. D. W. Va.*, 162 Fed. Rep. 722.

85.—**Fellow Servants.**—In an action for injuries to a servant by negligence of a fellow servant, plaintiff must prove that the fellow servant was incompetent, that the injury was caused thereby, and that the master, with notice of the incompetency, negligently retained the servant.—*Tucker v. Missouri & K. Telephone Co., Mo.*, 112 S. W. Rep. 6.

86.—**Injury to Servant.**—A lumber company operating a logging road held required to maintain reasonably safe appliances for the protection of its servants.—*Cavaness v. Morgan Lumber Co., Wash.*, 96 Pac. Rep. 1084.

87.—**"Res Ipsa Loquitur."**—The rule that the maxim, "Res ipsa loquitur," does not apply to cases between master and servant, does not prevent the establishment of a master's negligence by the circumstances surrounding the accident.—*Reed v. Norfolk & W. Ry. Co., U. S. C. C., S. D. W. Va.*, 162 Fed. Rep. 750.

88.—**Mechanic's Lien.**—Right to Lien.—Mere exaction, permission, knowledge, or acquiescence by a vendor in the act of a vendee in possession in improving the property held insufficient to charge the vendor's interest with a materialman's lien for materials furnished the vendee under Comp. Laws, 1907, Sec. 1372.—*Belnap v. Condon, Utah*, 97 Pac. Rep. 111.

89.—**Mines and Minerals.**—Construction of Oil Lease.—An oil lessee, having an exclusive right to explore for and remove oil from the leased premises, has a right of action to recover damages against one who without his consent enters upon the premises and removes oil therefrom during his term.—*Backer v. Penn Lubricating Co., U. S. C. C. of App., Sixth Circuit*, 162 Fed. Rep. 627.

90.—**Fixtures.**—Buildings, machinery, etc., constructed on land leased for mining, held not fixtures, but removable by the lessees, subject to landlord's lien for unpaid royalty.—*Cherokee Const. Co. v. Bishop, Ark.*, 112 S. W. Rep. 189.

91.—**Mortgages.**—Partial Release.—A mortgagee who, having actual knowledge of a subsequent lien against parcels of the mortgaged premises, releases other parcels, held to discharge the parcels, subject to such junior lien, wholly or partly, from liability under the mortgage.—*Schaad v. Robinson, Wash.*, 97 Pac. Rep. 104.

92.—**Municipal Corporations.**—Contracts for Public Service.—Municipal contract for public service will be sustained where the power is given to make the contract, and the terms of it taken with the law controlling it are not clearly violative of some provision of law.—

State v. Tampa Waterworks Co., Fla., 47 So. Rep. 358.

93.—**General Powers.**—General powers given to a municipality should be construed with reference to the purpose of its incorporation, and the general grant of powers includes all powers fairly within the terms of the grant and essential to the purpose of municipality.—*State v. Tampa Waterworks Co., Fla.*, 47 So. Rep. 358.

94.—**Ordinances.**—The ordinances of the city of St. Louis, in order to be valid, must be consistent with the general laws of the state and must be in harmony with the legislative policy of the state, manifested by its general enactments and as provided for in express terms by the Constitution.—*City of St. Louis v. Klausmeier, Mo.*, 112 S. W. Rep. 516.

95.—**Power to Make Improvements.**—The proposition adopted by the voters of a village as to the construction of a sewer system, held to authorize the village trustees to raise by taxation a certain sum for the construction of the system.—*Mead v. Turner*, 112 N. Y. Supp. 127.

96.—**Repeal of Ordinance.**—The repeal of a city ordinance pending a prosecution under its provisions operates to relieve the defendant, unless it is otherwise provided in the act repealing the ordinance.—*City of St. Louis v. Wortman, Mo.*, 112 S. W. Rep. 520.

97.—**Navigable Waters.**—State Control of Lands Under Waters.—The state cannot abdicate general control over the lands under navigable waters within the state.—*State v. Gerbing, Fla.*, 47 So. Rep. 353.

98.—**Nuisance.**—Acquisition of Rights by Prescription.—One who owned and lived on land before it was injured by a nuisance held entitled to recover, though the residence on the property was erected after the nuisance came into being.—*Gordon v. Village of Silver Creek*, 112 N. Y. Supp. 54.

99.—**Injunction.**—Where a doubt arises as to the right of plaintiff to maintain a suit or as to the existence of the nuisance complained of, equity will not interfere until the questions are settled by a judgment at law.—*Van Buskirk v. Bond, Or.*, 96 Pac. Rep. 1103.

100.—**Obstructing Justice.**—Legal Process.—One charged with resisting an officer in the levying of an execution held entitled to show that the judgment was void and that the officer had knowledge thereof.—*State v. Knopf, Wash.*, 96 Pac. Rep. 1076.

101.—**Payment.**—Mistake of Law.—Money paid in ignorance of facts is recoverable; while money paid under a mistake of law, with knowledge of the facts, is not recoverable.—*Scott v. Ford, Or.*, 97 Pac. Rep. 99.

102.—**Physicians and Surgeons.**—Action for Services.—A physician rendering services at the request of an attorney in physically examining a client injured through the negligence of another held entitled to compensation only for the value of the services, which was not increased because plaintiff might have had to testify in court.—*Henderson & Campbell v. Hall & Hughes, Ark.*, 112 S. W. Rep. 171.

103.—**Principal and Agent.**—Authority of Agent.—A conductor held to possess implied authority to employ a surgeon to treat a person struck by a train.—*Bonnette v. St. Louis, I. M. & S. Ry. Co., Ark.*, 112 S. W. Rep. 220.

104.—**Authority of Agent.**—One claiming un-

der a conveyance executed by a purported agent must show that the agent was authorized by the owner; and the mere acting of one under the claim that he is an agent does not prove his authority.—*Travers v. Barrett, Nev.*, 97 Pac. Rep. 126.

105. **Public Lands**—Cutting Timber.—A company obtaining lumber from government land through a fraudulent scheme with an individual, to enter on it as a homestead held liable for the full value of the lumber received.—*United States v. Flint Lumber Co., Ark.*, 112 S. W. Rep. 217.

106. **Railroads**—Conditions Printed on Ticket.—Where a passenger's ticket contained on its face nearly two quarto pages of printed provisions, the holder of the ticket was bound to have it read to her, if she could not read it herself.—*French v. Merchants' & Miners' Transp. Co., Mass.*, 85 N. E. Rep. 424.

107.—Contributory Negligence.—An adult person who voluntarily left a railroad car in which he was riding several blocks before reaching a station, and stood upon the open platform, where he was killed in a collision, no one inside the cars being seriously injured, held chargeable with contributory negligence which precluded a recovery for his death.—*Chicago Great Western Ry. Co. v. Mohaupt, U. S. C. C. of App.*, Eighth Circuit, 162 Fed. Rep. 665.

108.—Effect of Appointment of Receiver.—The appointment of a receiver of a railroad company held not to dissolve the company nor to hinder the exercise of corporate functions except those involved in the management of the property by the receiver.—*United States & Mexican Trust Co. v. Delaware Western Const. Co., Tex.*, 112 S. W. Rep. 447.

109. **Release**—Fraud.—At common law a release cannot be questioned in an action at law except for fraud affecting its execution, and for fraudulent representations affecting the consideration equity alone can give relief.—*Olston v. Oregon Water Power & Ry. Co., Or.*, 96 Pac. Rep. 1095.

110. **Religious Societies**—Judicial Supervision.—Secular courts have no jurisdiction over purely ecclesiastical matters, and mandamus held not to lie to require the appointment of arbiters to determine a relator's right to reinstatement as a member of a church.—*State v. Cummins, Ind.*, 85 N. E. Rep. 359.

111. **Sales**—Conditional Sales.—Where an alleged sale with reservation of title until payment is not admitted by the alleged buyer, the burden of proving a continuance of the indebtedness is on the seller.—*Black v. Roberson, Ark.*, 112 S. W. Rep. 402.

112.—Time for Delivery.—Acquiescence by a buyer in the delay of a seller in manufacturing the article and making the same ready for shipment operates as an extension of the time for delivery.—*Tidwell v. Southern Engine & Boiler Works, Ark.*, 112 S. W. Rep. 152.

113. **Street Railroads**—Compelling Operation.—A railroad may be compelled to operate its road continuously when expressly required to do so by its charter, as well as to construct its road and run its cars to a certain point in such case; but not when its charter simply authorizes its construction without requiring it.—*Selectmen of Amesbury v. Citizens' Electric St. R. Co., Mass.*, 85 N. E. Rep. 419.

114. **Time**—Inclusive or Exclusive.—Whether

the word "from" shall be construed as inclusive or exclusive depends on the context, or the subject-matter, and particularly on the expressed intention of the parties.—*Budds v. Frey, Minn.*, 117 N. W. Rep. 158.

115. **Trade-Marks and Trade-Names**—Good Will of Business.—One, who by advertising and selling a particular kind of bread, acquires a good will, is entitled to protection against any one seeking to avail himself of a demand in the market for his bread.—*George G. Fox Co. v. Hathaway, Mass.*, 85 N. E. Rep. 417.

116. **Trover and Conversion**—Abandonment of Right to Property.—One may abandon his right to property by evidencing his intention by an act legally sufficient to divest ownership, and another reducing the property to possession after such abandonment is not guilty of conversion.—*Huggins v. Reynolds, Tex.*, 112 S. W. Rep. 116.

117. **Vendor and Purchaser**—Purchaser's Right to Possession.—A contract reciting that the owner of premises had received of a person \$100 as a deposit on the purchase price, \$2,500 balance to be paid upon the delivery of an unlimited certificate of title, does not confer a right of possession upon the person.—*Winchester v. Becker, Cal.*, 97 Pac. Rep. 74.

118. **Waters and Water Courses**—Construction of Railroad.—A railroad held not liable to the owner of adjacent land for surface water damaging the adjacent land because of the ditches on the railroad land being filled up.—*Sabetto v. New York Cent. & H. R. R. Co.*, 112 N. Y. Supp. 118.

119.—Surface Waters.—Lot owner in populous city who obstructs underground drain on his lot to prevent its carrying surface waters from other lots held not liable for damages nor subject to be enjoined.—*Levy v. Nash, Ark.*, 112 S. W. Rep. 173.

120. **Wills**—Construction.—Assignment of mortgage by trustee after maturity of note by which mortgage was secured held not void as an attempt by a trustee to convert the estate from one form of security into another.—*Bremer v. Columbian Nat. Life Ins. Co., Mass.*, 85 N. E. Rep. 439.

121.—Construction.—Will construed, and share of son of testator dying without issue after death of brother and sister leaving issue held to go to surviving children of testator and not to the grand-children.—*Davies v. Davies*, 112 N. Y. Supp. 157.

122.—Contest.—In proceedings by a son to contest the will of his father, one of the questions being as to whether testator's belief that contestant was illegitimate was an insane delusion, the chastity of testator's wife—contestant's mother—was in issue, and evidence of her chaste reputation was admissible.—*O'Dell v. Goff, Mich.*, 117 N. W. Rep. 59.

123.—Testamentary Capacity.—Testamentary capacity being presumed, the burden of proof is on one attacking a will on the ground of insanity, and, if testator's general capacity is conceded, the proof must be of the clearest and most satisfactory kind.—*Taylor v. McClintock, Ark.*, 112 S. W. Rep. 405.

124. **Witnesses**—Competency.—A will contest between legatees and disinherited children of testator held not an action "by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent," within Rev. St. 1895, art. 2302, and hence that a party in such an action could testify as to a statement made to her by decedent.—*Simon v. Middleton, Tex.*, 112 S. W. Rep. 441.

125.—Hostility to Accused.—A witness should not be permitted to testify that certain other witnesses who testified against accused were hostile to him, unless the witness' knowledge as to such feeling, attitude, and disposition of such other witnesses is shown.—*Burnett v. State, Tex.*, 112 S. W. Rep. 74.

INDEX-DIGEST

TO THE EDITORIALS, NOTES OF RECENT DECISIONS,
LEADING ARTICLES, ANNOTATED CASES, LEGAL
NEWS, CORRESPONDENCE AND BOOK RE-
VIEWS IN VOL. 67.

A separate subject-index for the "Digest of Current Opinions" will be found on page 489 following this Index-Digest.

ACTIONS,

where the cause of action returns to life, 478.

ADOPTION,

inheritance by adopted children, 436.
shall statutes conferring the right of adoption be strictly or liberally construed, 441.

ADULTERY,

is cohabitation between a married man and a single woman adultery, 376.

ALIENS,

appeal in Chinese exclusion cases, 23.

ALIMONY,

See DIVORCE.

APPEAL AND ERROR,

presumptions on appeal in support of the judgment, 234.
the law of the case, 255.
extent of original jurisdiction exercised by courts of appeal, 324, 326.
original jurisdiction of supreme courts limited to questions publici juris, affecting the sovereignty of the state or the general welfare, 468.

ASSAULT AND BATTERY,

abusive language of prosecuting witness tending to mitigate damage, 254.

ASSOCIATIONS,

See SOCIETIES.

ATTORNEY AND CLIENT,

property retained by attorneys on ground of illegal or immoral design on the part of parties who trusted them, 81.
enforcement of attorney's lien where settlement of case is affected by client, 123.
is a reflection on trial court's motives in rendering decision ground for disbarment, 355.

AUTOMOBILES,

is an automobile a "dangerous instrument" within the meaning of the rule holding a master liable for its permitted personal use by his servant, 467.

BAIL,

right of bail to arrest principal, 1.

BANKRUPTCY,

danger of hasty filing of involuntary bankruptcy petitions, 72.

BANKS AND BANKING,

what liability does a bank assume as to the quality and quantity of the goods described in a bill of lading indorsed by it, 105.

BENEFIT SOCIETIES,

ultra vires contracts for benefit societies, 43.
suspension of members for non-payment of dues, 69, 72.
liability of membership in an assessment association, 266.

BILLS AND NOTES,

notice to transferee of corporate paper, 29, 33.
introduction in evidence of note and indorsement of payee establishes prima facie case, 123.

BOOKS RECEIVED,

93, 385, 404.

CARRIERS OF GOODS,

validity of general clause exempting railroads from liability for destruction of baggage, 274.
breach of an unconditional contract between a shipper and a carrier to transfer and to deliver an emergency shipment at a specified destination by a stated time, is not excused by inevitable accident or necessity, 336.

CARRIERS OF PASSENGERS,

duty to passengers at destination, 42.
when the relation of passenger and carrier commences, 84.

CHARITIES,

where part of charitable bequest is valid and part invalid does the whole bequest become void, 261, 264.

CLUBS,

See SOCIETIES.

COMMERCE,

the relation of the Wilson act to a license of the sale of intoxicating liquors, 2.
right of federal government to protect shipments of trees from communicable diseases, 64.

COMPROMISE,

remedies where there has been a breach of a compromise agreement to a cause of action obtained by fraud, 121.
validity of a statute providing that acceptance from relief association shall be no bar to an action for damages, 143.

CONSPIRACY,

interference with contract relations other than that of master and servant, 201, 206.
liability of fourth parties for interference with contractual relations, 253.

CONSTITUTIONAL LAW.

See **COMMERCE; POLICE POWER.**

- whether bail may arrest principal without judicial proceedings and take him to another state, 1.
- validity of a statute providing that acceptance from relief association shall be no bar to an action for damages, 143.
- validity of bulk sales laws, 166, 169.
- right of state to convey title to tide lands or exclusive privilege to plant oysters thereon, 179.
- power of legislature to make contractor agent of property owner for the purpose of establishing a mechanic's lien, 246.
- passing of state autonomy, 275.
- the new question of state's rights, 281.
- regulation of rates to be charged by public service corporations—miscellaneous enterprises affected with a public interest, 299.
- right to use gun in threatening manner to resist a trespass, 376.
- is the federal government capable of taking ownerless property by escheat, 429.
- validity of statute requiring moneys deposited in federal courts to be turned over to the treasurer of the United States, 429.

CONTRACTS.

- failure to perform executory agreement which is part of consideration, 82.
- remedies where there has been a breach of a compromise agreement to a cause of action obtained by fraud, 121.
- admissibility of parol evidence to vary terms, 122.
- interference with contract relations other than that of master and servant, 201, 206.
- liability of fourth parties for interference with contractual relations, 253.
- validity of contracts agreeing to give railroad mileage in return for advertising, 328.
- general rule as to the contractual liability of the manufacturer of injurious foods to the consumer, 384.
- measure of damages for failure to deliver at time mentioned in contract an article having no market value, 459.

CORPORATIONS.

- payment for capital stock in overvalued property, 83.
- misrepresentation in sale of stock as ground for rescission and recovery of money paid, 107, 111.
- when creditors' suits are maintainable, 152.
- the trust relation between corporation officers and stockholders buying of or selling their stock to them, 450.

COURTS.

- a proposition for a new federal court having jurisdiction over patents, trade-marks and copyrights, 53.
- duty of courts to enforce obsolete laws, 141.
- Judge Eaton on bar primaries for the selection of judicial candidates, 245.
- is there a twilight zone between the nation and the state, 273.
- extent of original jurisdiction exercised by courts of appeal, 324, 326.
- validity of statute requiring moneys deposited in federal courts to be turned over to the treasurer of the United States, 429.
- original jurisdiction of supreme courts limited to questions publici juris affecting the sovereignty of the state or the general welfare, 468.

CRIMINAL EVIDENCE.

- proof of the corpus delicti, 103.

CRIMINAL LAW.

- the crime of perjury, 12.
- the failure of American criminal law, 411.
- constructive crimes defined, 467.

CRIMINAL TRIAL.

- right of bail to arrest principal, 1.
- comments of judge on giving instructions, 316.
- power of court to indefinitely suspend judgment in a criminal case, 343, 344.

DAMAGES.

- validity of a statute providing that acceptance from relief association shall be no bar to an action for damages, 143.
- mental anguish arising from negligence in delivery of telegram presumed from relationship of parties, 285, 286.
- earning capacity and anticipatory profits, 457.
- measure of damages for failure to deliver at time mentioned in contract an article having no market value, 459.
- rental value as a measure of damages for failure to deliver article according to contract, 460.

DIGEST OF CURRENT OPINIONS.

- 13, 34, 55, 74, 94, 104, 115, 134, 156, 172, 190, 207, 227, 246, 267, 289, 309, 328, 348, 368, 386, 405, 422, 442, 461, 479.

DIVORCE.

- a review of the leading case of *Haddock v. Haddock*—service of process, 66.
- is a cause of action for divorce affected by repentance and promises of reform on the part of the wrong-doer, 335.
- right to alimony on annulment of marriage, 430.

EASEMENTS.

- what is a "way of necessity," 216.

ELECTION OF REMEDIES.

- remedies where there has been a breach of a compromise agreement to a cause of action obtained by fraud, 121.

EMINENT DOMAIN.

- effect upon the exercise of the right of eminent domain of the intermingling of a private with a public use, 199.

EQUITY.

- equity does not adjust differences between rogues, 65.
- equity will not interfere between parties in pari delicto—exception as to confidential relations, 81.
- equity suffers no right to be without a remedy, 130.
- right of equity to enjoin a multiplicity of actions sounding in tort against the same defendant for the same wrong, 171.
- right of equity to restrain criminal proceedings instituted vexatiously or to affect the exercise of civil rights, 297.

ESCHEAT.

- is the federal government capable of taking ownerless property by escheat, 429.

ETHICS.

- canon of professional ethics submitted by special committee of the American Bar Association, 43.
- a lawyer on legal ethics, 113.
- is it a violation of legal ethics to answer legal questions in newspapers, 131.

EVIDENCE.

- Judicial notice of communicable diseases in plant life, 64.
- telephonic communications as evidence, 198.
- admissibility of introducing in evidence in proof of seduction the child born of the meretricious union, 394.

FEDERAL COURTS.

See **COURTS.**

FIRE INSURANCE.

- change of location of thing insured, 8, 10.

FISH.

- injunction to prevent interference with right to hunt or fish, 400.

FLAG.

See **POLICE POWERS.**

FOREIGN CORPORATIONS.

- foreign corporations pleading capacity to sue, 3.

FRAUD,

remedies where there has been a breach of a compromise agreement to a cause of action obtained by fraud, 121.

FRAUDS, STATUTE OF,

sufficiency of contents of memorandum and description of land, 102.

GAME AND GAME LAWS,

injunction to prevent interference with right to hunt or fish, 400.

GARNISHMENT,

do the married women's acts permit a personal judgment to be rendered against a married woman garnished for her husband's debt, 215.

HUMOR OF THE LAW,

13, 34, 54, 73, 94, 114, 133, 156, 172, 190, 207, 227, 246, 267, 288, 308, 328, 347, 368, 386, 404, 422, 442, 460, 478.

HUSBAND AND WIFE,

do the married women's acts permit a personal judgment to be rendered against a married woman garnished for her husband's debt, 215.
right of husband to sue for injury to wife accruing before marriage and during their engagement, 275.

INFANCY,

the law in its relation to the child, 395.

INJUNCTION,

right of equity to restrain criminal proceedings instituted vexatiously or to affect the exercise of civil rights, 297.
breach of contract to engage in similar employment, 356.
restraining proceedings under penal ordinances, 364, 367.
injunction to prevent interference with right to hunt or fish, 400.

INNKEEPERS,

who are innkeepers, 162.

INSURANCE,

See BENEFIT SOCIETIES; FIRE INSURANCE; LIFE INSURANCE.

INTERNATIONAL LAW,

the sanction of international law, 217.

INTOXICATING LIQUORS,

the relation of the Wilson act to a license of the sale of intoxicating liquors, 2.
is there a vested right in the liquor business, 111.
the working of the prohibition law in Georgia, 449.

JUDGMENTS,

distinction between law of the case and res adjudicata, 63.

JURIES,

juries and the unwritten law, 422.

LANDLORD AND TENANT,

personal injuries due to defective premises where condition of premises is misrepresented to tenant, 62.

LAW AND LAWYERS,

Kansas woman probate judge, 13.
Daniel Boone as a judge, 33.
canon of professional ethics submitted by special committee of the American Bar Association, 43.
annual meeting of the American Bar Association, 90.
poetry and the law, 92.
a lawyer on legal ethics, 113.
lawyers and out-lawyers, 113.
American lawyers in Switzerland, 131.
meeting of the attorneys-general of the United States, 156.
the ability of lawyers to draw wills, 171.
the longest law suit, 245.
Judge Eaton on bar primaries for the selection of judicial candidates, 245.

LAW AND LAWYERS, (Continued.)

report of the meeting of the association of the attorneys-general of the United States, 265.
a layman's opinion of lawyers, 288.
how to explain to your client why you lost his case, 307.
alarming increases of case law, 328.
unfruitful law suits, 346.

LAW BOOKS,

Miscellaneous.
Oklahoma Form Book, 73.
Pierce on Federal Usurpation, 114.
the anonymous commentary on Littleton, 403.
Reviews of Digests.
American Digest, 1907 A., 13.
Reviews of Encyclopaedias.
Cyclopedia of Law & Procedure, Vol. 27, 114.
Reviews of Reports.
American State Reports, Vol. 117, 113.
American State Reports, Vol. 118, 133.
American State Reports, Vol. 119, 190.
Probate Reports, Annotated, Vol. 12, 422.
Reviews of Statutes.
Compiled Laws of the State of Utah, 1907, 73.
Reviews of Text Books.
Joyce on Indictments, 54.
Tiffany on Sales, 54.
Frost on Incorporation and Organization of Corporations, 73.
Beavan on Negligence, 92.
Stimson on Federal and State Constitutions, 92.
Devlin's Treaty Power, 172.
Cooke on the Commerce Clause, 308.
Moore on Facts, 404.

LAW SCHOOLS,

advisability of a longer law school course and of a higher standard of admission, 85.

LEGAL EDUCATION,

See LAW SCHOOLS.

LEGAL ETHICS,

See ETHICS.

LIFE INSURANCE,

whether failure to pay note given for initial premium invalidates policy, 122.
presumptions against suicide, 142.
power of state to determine form and provisions of life insurance policies, 298.

MALICE,

the malicious use of one's property, 23.

MARRIAGE,

right to alimony on annulment of marriage, 430.

MARRIED WOMEN'S ACTS,

See HUSBAND AND WIFE.

MASTER AND SERVANT,

duty of master to furnish safe appliances, 50, 53.
what constitutes a safe place to work, 305, 306.
breach of contract to engage in similar employment, 356.
defense in actions for personal injury when there has been a violation of statutory regulation by defendant, 431.

MAXIMS,

cujus est instituere ejus est abrogare, 61.

MECHANICS' LIENS,

will a mechanic's lien lie against the property of the Jamestown Exposition Company, 163.
power of legislature to make contractor agent of property owner for the purpose of establishing a mechanic's lien, 246.

MOB AND MOB LAW,

what shall be done with the mobs, 315, 375.

MONOPOLIES,

trust bursting under the common law, 181.

MUNICIPAL CORPORATIONS.

can a board of aldermen extend time for performance of paving contract, 21.
contractor with city must see that preliminary steps required by law are taken, 41.

NEGLIGENCE.

liability of manufacturers of food products for injuries to third persons, 330, 333.
liability of owners of dangerous property attractive to children, 419, 420.
defense in actions for personal injury when there has been a violation of statutory regulation by defendant, 431.
is an automobile a "dangerous instrument" within the meaning of the rule holding a master liable for its permitted personal use by his servant, 467.

OBSOLETE LAWS.

duty of courts to enforce obsolete laws, 141.

PARDON.

procedure for recommitment on breach of condition in conditional pardon, 187, 188.

PARENT AND CHILD.

superior right of parent to custody of minor child, 197, 478.
the law in its relation to the child, 395.

PHYSICIANS AND SURGEONS.

what evidence is sufficient to sustain an action for malpractice, 88.
whether statutes regulating practice of medicine apply to schemes of healing which do not administer drugs, 221, 225.

PLEADING.

allegata et probata must correspond, 347.
the function of pleading in a government of protection, 393.

POLICE POWER.

may a state in the exercise of the police power prohibit the use of the national flag for advertising purposes, 3.

PRINCIPAL AND AGENT.

burden of proving agency, 84.
is there any distinction as to liability between general and special agents, 377.

PRINCIPAL AND SURETY.

liabilities of heirs and estate of co-sureties for breach of bond, 124.

PUBLIC PROPERTY.

are natural water powers public property, 356.

RAILROADS.

the Standard Oil rebate case, 101, 132, 133, 170, 189, 236.
regulation of rates to be charged by railroad companies, 317.
extent of railroad's liability for failure to comply with provisions of the federal safety appliance act, 475, 476.

RATE REGULATION.

See **REBATES.**
regulation of rates to be charged by public service corporations—miscellaneous enterprises affected with a public interest, 299.
regulation of rates to be charged by railroad companies, 317.

REBATES.

the Standard Oil rebate case, 101, 132, 133, 170, 189, 236.

RECEIVERS.

winding up affairs of non-resident corporations—what law governs, 155.
excessive allowances to receivers of defunct banking institutions a reproach to the administration of justice, 233.

SAFETY APPLIANCE ACT.

extent of railroad's liability for failure to comply with provisions of the federal safety appliance act, 475, 476.

SALES.

failure to perform executory agreement which is part of consideration, 32.
validity of bulk sales laws, 166, 169.
liability of manufacturers of food products for injuries to third persons, 330, 333.
rental value as a measure of damages for failure to deliver article according to contract, 460.

SCHOOLS AND SCHOOL DISTRICTS.

right of school boards to suspend pupils in absence of any specific regulation for breaches of decency or disrespect of school discipline, whether committed within or outside of school hours, 241, 244.

SEDUCTION.

admissibility of introducing in evidence in proof of seduction the child born of the meretricious union, 394.

SOCIETIES.

liability of membership in an assessment association, 266.

STATUTES.

duty of courts to enforce obsolete laws, 141.

STREET RAILROADS.

liability for crowded condition of cars, 130.
care required to prevent collision with fire department apparatus, 336.

TELEGRAPHS AND TELEPHONES.

right of telephone company to limit use of telephone to subscriber, 161.
mental anguish arising from negligence in delivery of telegram presumed from relationship of parties, 255, 258.
recovery of damages for mental suffering dependent on the relationship between the parties, 451.

THEATERS AND SHOWS.

liability of management for injury to spectator under implied contract as to safety, 412.

TITLES.

Virginia titles in Eastern Kentucky, 10.

TORTS.

the malicious use of one's property, 23.
interference with contract relations other than that of master and servant, 201, 206.
liability of fourth parties for interference with contractual relations, 253.
liability of manufacturers of food products for injuries to third persons, 330, 333.

TRADEMARKS.

protection not granted to use of name calculated to deceive, 65.

TRIAL AND PROCEDURE.

when party erroneously assumes the burden of proof, 198.

TRUSTS AND TRUSTEES.

the trust relation between corporation officers and stockholders buying of or selling their stock to them, 452.

VENDOR AND PURCHASER.

the doctrine of caveat emptor should be invoked whenever necessary to protect vested rights, 126.

WATERS AND WATER COURSES.

right of state to convey title to tide lands or exclusive privilege to plant oysters thereon, 179.
are natural water powers public property, 356.
property in running and falling water, 413.

WEAPONS.

right to use gun in threatening manner to resist a trespass, 376.

WILLS.

typewritten wills, 207.
resumption of undue influence from professional relationship of testator and legatee, 377.
facts about the Tilden will, 421.

SUBJECT-INDEX

TO ALL THE "DIGESTS OF CURRENT OPINIONS" IN VOL. 67.

This subject-index contains a reference under its appropriate head to every digest of current opinions which has appeared in the volume. The references, of course are to the pages upon which the digest may be found. There are no cross-references, but each digest is indexed herein under that head, for which it would most naturally occur to a searcher to look. It will be understood that the page to which reference, by number, is made, may contain more than one case on the subject under examination, and therefore the entire page in each instance will necessarily have to be scanned in order to make effective and thorough search.

- Abandonment**—statutory provisions, 156; water rights, 55; what constitutes, 267.
- Abatement and Revival**—action for rent, 55; causes which survive, 173; death of joint defendant, 329; death of party, 34; discontinuance, 156; pendency of another action, 227; statutes, 246.
- Abortion**—Indictment and information, 443.
- Abstracts of Title**—effect of publication, 14.
- Accident Insurance**—breach of warranty, 227; burning buildings, 386; cause of death 309; computing time of notice, 269; misrepresentations, 348; notice 269; payment of premium, 207; rule of construction, 247.
- Accord and Satisfaction**—part payment, 191-207; payment by check, 380; payment by third person, 348; tender of part in full satisfaction, 74; what constitutes, 338.
- Account**—equitable jurisdiction, 115.
- Account, Action on**—evidence, 191.
- Account Stated**—estoppel, 94; instructions, 34; presumptions, 74; statute of frauds, 191.
- Acknowledgment** — certificate, 191; defective acknowledgment, 14; homestead, 338; married women, 14; persons entitled to take, 94; time for making certificate, 443.
- Action**—consolidation, 55; equitable relief and defenses, 74; improper exclusion act, 173; intent to commit fraud, 227; joinder of causes, 405; legal and equitable, 94; nature of elements, 329; other action pending, 329; waiver of tort, 368.
- Adjoining Landowners**—excavation, 94-329; lateral support, 14.
- Admiralty**—claims for loss of life, 348. costs, 74; costs, 134; libel, 386; negligence, 387; reopening case to introduce deposition, 329.
- Adoption**—consent of parents, 461; equitable right of parent to interfere, 191; parol adoption, 134.
- Adultery**—sufficiency of indictment, 115.
- Adverse Possession**—abandonment, 289; abandonment after acquisition of title, 267; against whom statute may run, 156; assessments of taxes, 289; boundaries, 134-348; color of title, 34-247; constructive possession, 348-368; easements, 227; equitable title of plaintiff, 329; hostile character, 191; instruction, 348; interlock, 289; land within congressional grant, 34; nature of title acquired, 267; prescription, 443; question for jury, 115; river as boundary, 14; tacking, 289; taking successive possession, 227; tax title, 289; title by public, 209; what constitutes, 289.
- Agriculture**—destruction of infected apples, 329; line on crops, 267.
- Aliens**—burden of proving citizenship, 348; Chinese exclusion act, 173; deportation, 289; naturalization, 368; presumptions, 405; statutes, 34.
- Alteration of Instruments**—alteration by strangers, 247; authority of agent, 74; filling blanks, 423; presumptions, 289.
- Animals**—agistment, 191; contributory negligence of owner, 423; diseased cows, 483; evidence of viciousness, 423; fences, 247; killing trespassing animals, 329; liability of owner, 348; quarantine, 207; stock law election, 405; vicious cow, 14.
- Appeal and Error**—abstracts and record, 173; action to abate, 348; acts of parts of appellants, 134; amendment to statement, 329; appealable order, 309; appellate jurisdiction, 14; assignment of error, 55-208-247-267-289; bill of exceptions, 94-115-156-257-267-368-387; change of venue, 461; common joinder in error, 423; cross examination, 55; damages, 94; decree pro confesso, 387; determination of exceptions, 461; devolutive appeal, 405; directed verdict, 348; dismissal, 94-309; effect of former decision, 227; error cured by subsequent instruction, 34; error in judgment entry, 134; estoppel to allege error, 227; estoppel to question judgment, 423; evidence, 348; exceptions, 387; excessive damages, 479; ex parte affidavit, 387; failure to set out points and arguments, 268; filing plea, 74; findings, 157; findings of fact, 208; finding of trial court, 173; harmless error, 14-34-94-115-377-441-479; instructions, 94-289; judgment, 55-267; judgment entered in vacation, 116; jurisdiction, 289; law of the case, 34-208-349; liability insurance, 423; matters not presented below, 405; matters not presented in trial court, 443; misconduct of counsel, 349; necessity of objections, 191; negligence, 94; new parties, 55; objection to evidence, 227; offer of proof, 368-479; overruling a motion, 349; parties entitled to allege error, 74; plea of privilege, 423; pleading, 94; points not raised, 34; prejudice, 461; prior appeals, 423; procedure where record is incomplete, 227; proceedings below, 208; questions of fact, 74-95; reception of evidence, 55; record, 208-329; refusal to sanction certiorari, 289; rehearing, 208; relevancy of evidence, 461; reopening trial, 55; rescission of contract, 191; reservation of grounds for review, 208; review, 74-329-443; right to review, 173; rulings on demurrer, 14; scire facias, 95; settlement of trust accounts, 329; special verdict, 309; subsequent appeal, 461; successive appeals, 227; sufficiency of evidence, 14; sufficiency of statement, 208; suspensive appeal, 479;

- theory of the case, 95; transcript, 208; use in evidence, 405; who may appeal, 423; verdict, 479.
- Appearance**—appearance after decree, 14; application for change of venue, 387; jurisdiction, 34-55; jurisdiction acquired, 247; proceedings constituting, 95; service by publication, 267; waiver of irregularity, 191.
- Arbitration and Award**—agreement to arbitrate, 423; performance of award, 34; procedure, 134.
- Arrest**—necessity of warrant, 247; police power, 349; relief of persons imprisoned, 423.
- Assault and Battery**—criminal liability, 14; evidence, 405; instruction, 74-208; pleadings, 14; provocation, 74; willfully shooting at another, 268.
- Assignments**—conduct of assignee, 349; contracts, 227; equitable assignments, 227; future wages, 55; non-negotiable choses in action, 247; right of action, 461; rights of assignee, 228; wages, 55.
- Assignment For Benefit of Creditors**—management of estate, 208; receivers, 134; sale by trustees, 479.
- Associations**—action against member, 349; by-laws, 191.
- Assumpsit, Action**—recovery on common counts, 14.
- Attachment**—discharge of lien, 191; grounds, 191; motion to vacate, 75; service of process, 349; when allowed, 75.
- Attorney and Client**—admissions to practice, 173; authority for change of venue, 387; authority of attorney, 116-349; authority to collect money, 387; compensation, 55; compensation for services rendered, 479; confidential relation, 35; contract for services, 55; costs in investigating misconduct of attorney, 247; criticism of courts, 387; duty, 55; insulting judicial officer, 349; misconduct, 289; powers of attorney, 116; settlement by client, 247.
- Bail**—deposit in lieu of bail, 95; deposits in lieu of bail, 289; excessiveness, 405; forfeiture, 35-368; jurisdiction to admit to bail, 461; liability of surety, 405; nature and effect of recognizance, 55; transfer of cause, 116.
- Bailment**—breach of contract by bailee, 173; gratuitous bailment, 479; negligence, 309-387-423; replevin, 368; waiver as to terms of contract, 329.
- Bankruptcy**—accounting by trustee, 55; acknowledgment, 208; acts of bankruptcy, 309-443; adverse claim to property, 443; agreements, 479; allowance of attorney fees, 268; annuities, 228; appealable decisions, 369; assets, 157-268; assignment, 423; attachments, 423; attorney's lien, 134; change of domicile, 349; chattel mortgages, 35-349; claims against estate, 157-307-349-405; collusion between bankrupt and receiver, 349; composition, 14-134-208; concealed property, 387; concealment, 479; conditional sale contracts, 309-329-369; conflicting jurisdiction, 15; consent, 309; corporations, 208; corporations subject to act, 134; counsel fees, 349; defense of insanity, 387; disallowance of claims, 290; discharge, 55-228-268-349-387-479; discharge of judgment, 369; dissolved corporations, 290; effect on executory contracts, 35; effect on forthcoming bond, 191; election of trustees, 369; enforcement of attorney's lien, 405; estoppel to deny, 405; examination of bankrupt, 134; exemptions, 228-387-479; findings, 268; findings of referee, 443; foreign statement, 208; fraudulent transfers, 387; fraudulent transfer of property, 350; frivolous appeal, 479; hearing in bankruptcy proceedings, 329; homestead, 35-134; insane persons, 268; insolvency, 157; insurance by receiver, 208; involuntary proceedings, 423-479; jurisdiction, 350-369-405-443-479; liability of attorney, 443; liens, 157-268-405; manufacturing defined, 247; market value of assets, 269; mortgages, 135-290; local assignments, 228; partnership, 35-208-247-387-406; persons subject to adjudication, 405; petition to reclaim property, 15; petition to review, 135-350; petition to revise proceedings, 369; pleadings, 309-350; pleading discharge, 387; possession of property, 369; preferences, 35-75-208-268-290-350-443-479; preferred claims, 268; priority of judgment creditors, 423; procedure, 268; proceedings in different districts, 387; proof of claim, 388; property in possession of state court, 329; property passing to trustee, 135; provable cause, 247; probable debts, 329-479; questions not raised at trial, 480; receiver, 157; reclamation, 247; recovery of property, 173; referee, 443; replevin, 228-405; return of margined stock, 173; review, 388; rules, 157; rulings on evidence, 268; sale or return, 75; sale under foreclosure decree, 135; secured claims, 443; seizure in replevin, 208; subrogation, 208; suit by trustee to recover property, 369; surcharging account, 480; sureties of bankrupt, 369; time for filing claim, 388-369; time for taking appeal, 247-290; tracing funds, 268; transfers by bankrupt, 157; trustee's accounts, 406; vacation of receivership, 247-248; wage earners, 369; what constitutes, 329; witness fees, 350.
- Banks and Banking**—action on note, 191; aiding misappropriation, 350; checks, 95; claims due insolvent bank, 443; compensation, 369; compensation of receiver, 95; competency of depositor, 309; contracts, 461; dissolution, 350; forged check, 480; forged or altered check, 330; forgery, 369; insolvency, 15-443; insolvency and dissolution, 228; national banks liquidation, 268; payment of forged check, 424; payment on forged order, 388; president trustee, 388; sale of stock to bank, 444; surrender of shares, 406; ultra vires acts, 330.
- Bastards**—bonds, 56; credibility of complainant, 95; persons entitled to contest legitimacy, 56.
- Benefit Societies**—agents of insured, 208; beneficiaries, 424; by-laws, 56-75; compensation of officers, 228; forfeitures, 228; indorsement in blank, 228; insurable interest, 290; membership, 461; notice of sickness, 461; property rights, 135; recovery of money paid, 15; right of proceeds, 191; suit by trustee, 209; suspension of subordinate lodges, 157.
- Bigamy**—evidence, 135; powers of government, 209.
- Bills and Notes**—accommodation paper, 406; actions, 157; action by assignee, 369; action on draft, 247; attorney's fees, 116; bona fide holders, 191-268-424; bona fide purchasers, 15-75-157-228-268-330; bona fide purchaser of forged note, 480; collateral security, 424; conflict of laws, 290; consideration, 290-388; defenses, 191-461; delay in presenting check, 350; denial of execution, 135; drafts drawn in sets, 330; executory contract of sale, 290; failure of consideration, 268; holder for value, 424; joint makers, 330; liability of co-maker, 330; liability of endorser, 116 negotiability, 95; negotiable notes, 444; non est factum, 191; non-negotiable notes, 209; notice of dishonor, 480; provisions for arbitration, 444; purchasers for value, 209; questions for jury, 75.
- Bonds**—allegations as to seal, 209; negotiability, 173.
- Boundaries**—agreements, 350; ascertainment, 116; conflicting calls, 248; establishment, 135-157-480; estoppel, 209; rejection of call, 35.
- Bridges**—duty of counties, 406; establishment and maintenance, 290; notice of claim for injuries, 116.
- Brokers**—action for compensation, 173; action for services rendered, 461; adverse interests, 191; authority to sell land, 228; commissions, 15-35-56-75-135-157-192-330-444 461; contracts, 75; contract commissions,

- 290; compensation, 388-406; delegation of authority, 350; employment and authority, 135; pledge of stock, 309; right to commission, 173-228-461; sale of land, 248; services after termination of contract, 406.
- Building and Loan Associations—insolvency, 135.**
- Burglary—possession of stolen property, 56; sufficiency of indictment, 228.**
- Cancellation of Instruments—conditions precedent, 290-369; failure of consideration, 369; false representations, 330; fraud, 95; laches, 95; mistake, 209; mistake of law, 406.**
- Carriers—assault on passenger, 424; authority of station agent, 268; baggage checks, 56; baggage of passenger, 350; bill of lading, 388; care in transporting live stock, 424; carriers of freight, 95; carriage of goods, 35-269; carriage of live stock, 157-228; carriage of passenger, 406; carrying passenger beyond destination, 157-290; change in nature of liability, 15; charges, 209; common law liability, 135; concurrent negligence, 209; connecting carriers, 35; contract of carriage, 388; contracts enforceable, 56; contracts with shippers, 173; contributory negligence, 290-444-480; damages for delay in shipment, 330; delay in freight shipment, 35; delivery of freight in damaged condition, 192; demurrage charges, 135; discriminating rates, 35; duty of shipper to inspect car, 369; duty to protect passenger, 444; duty to receive and transport, 35; ejection of passenger, 157-350; emergency, 480; express companies, 135; failure to furnish cars, 75; failure to inspect car, 157; failure to properly route shipment, 330; freight charges, 56; freight rates, 248; injunction to restrain enforcement of rates, 388; injury to alight-passenger, 209-228-444; injuries to passengers, 35-370; instruction in personal injury, 209; insulting passenger, 350; interstate commerce, 461; liability for warehouseman, 480; liability for negligence, 75; liability for passenger effects, 330; liability of carrier, 290; liens, 290; limitation of liability, 350-406; live stock shipment, 290; loss of goods, 116-209; negligence, 15-75-157-209-228-269-309-444; notice of damage to live stock, 370; obligation toward passenger, 209; pleadings in negligence actions, 209; protection from fellow passengers, 350; quarantine, 290; question for jury, 461; rights of connecting carriers, 35; rules and practices, 330; shipment of live stock, 444; soliciting hotel patronage at station, 248; special damages, 35; stipulation in bill of lading, 370; street cars, 173; through rates, 248; transportation of cattle, 462; transportation of freight, 291; warehouseman, 291; who are passengers, 192-388-444; wrongful ejection of passenger, 15.**
- Cemeteries—care of private lot, 75.**
- Certiorari—judgment, 116; persons entitled, 424; private prosecutors, 15.**
- ChamPERTY and Maintenance—contract with attorney, 388; conveyance of minor rights, 35; grants of land held adversely, 95.**
- Charities—hospitals, 444; rights of heirs, 330; trustees, 192; what constitutes, 75.**
- Chattel Mortgages—assignments, 157; breach of contract, 56; judgment liens, 291; mistake in date, 228; property to be manufactured, 330; replein, 406; seizure of intermingled logs, 480; splitting cause of action, 228.**
- **Clarks of Courts—recording judgment, 462.**
- Colleges and Universities—issuance of diploma, 291.**
- Commerce—interstate commerce, 158; intoxicating liquors, 462; regulation of telegraph company, 209; soliciting orders, 95; state interference, 173; state regulation, 209; subjects of regulation, 95; taxation, 15.**
- Common Law—effect of later English decisions, 444.**
- Compromise and Settlement—duty to disclose information, 75; requisite, 424; validity of agreement, 480.**
- Conspiracy—avertment of overt act, 248; boycott, 56; contract induced by conspiracy, 95; evidence, 95; evidence to establish, 15; securing title in public lands, 229; trade union strikes, 75.**
- Constitutional Law—amendments, 56; assessments for public improvements, 388; attempt to influence jurors, 330; burden of proof, 135; class legislation, 35; class regulation, 209; conflict of jurisdiction, 192; construction, 480; construction of provisions, 15; construction of statute, 192; criminal prosecution, 330; delegation of power to fix railway rates, 388; due process of law, 157-174-229-388-444-462-480; Elkins act, 248; equal protection, 95-157-269-350; ex post facto laws, 248; fellow servant law, 269; foreign corporation, 406; grant of power, 461; improvements of highway, 444; insurance statutes, 350; interstate commerce, 75; legislature and judiciary, 330; legislative powers, 15; liberty to contract, 406; license tax, 330; license tax on street railway, 350; obligation of contracts, 15-388-424-444; personal rights, 370; police power, 248-291; powers of government, 210; presumption in favor of validity, 350; privileges and immunities, 95; regulating hours of employment, 56; regulation of carriers, 330; regulation of insurance, 480; right of mayor to remove city officer, 229; right of state to take charge of minor, 424; right to contest validity of statute, 330; right to raise constitutional questions, 406; safety appliance act, 351; smoke ordinance, 444; statutes, 35-331; territorial legislature, 210; validity of statute, 36-116; vested rights, 210-331.**
- Contempt—abatement, 388; acts constituting, 462; criticising rulings of court, 291; punishment, 174.**
- Continuance—terms, 35; when allowed, 116.**
- Contracts—action for breach, 309; agreements for procuring government contracts, 269; action to enforce, 269; agreement between stockholders, 269; agreement for benefit of third party, 96; breach of contract, 480; building contracts, 174; compensation, 269; consideration, 56; construction, 96-135-157-210-229-331-388; corporations, 424; department store space, 210; duress, 248; enforcement, 157; excuse for defects in work, 229; extra work, 462; failure to read, 229; forfeiture, 444; fraud in procurement, 269; implied contracts, 229; implied warranties, 424; legality, 370; modification, 56; mutual assent, 192; nonperformance, 291; part performance, 444; performance, 56-210-462; pleading, 75; reasonable time, 248; requisites and validity, 135; rescission, 351; right to recant, 406; stipulation in building contract, 480; subscription of stock, 370; sufficiency of performance, 158; time as the essence, 248; time for performance, 210; undue influence, 291; unpaid stock subscription, 310; waiver of breach, 248; what law governs, 210; written and printed parties, 351.**
- Contribution—directors and officers of bank, 229; joint debtors, 351.**
- Conversion—intent of testator, 174.**
- Convicts—conveyance, 406; hiring bond, 86.**
- Copyrights—double copyrighting, 247; musical composition, 56; publication abroad, 36; restrictions on sale by purchasers, 388.**
- Corporations—accommodation paper, 36; actions, 174; acts constituting continuous offenses, 116; agent's unauthorized contract, 75; agreement to purchase, 444; articles of incorporation, 480; authority of officers, 135-351; capital stock and dividends, 76; compensation of officer, 351; consolidation, 116; contracts, 210; conveyance of real estate, 388; corporate name, 462; corporate powers, 136; directors, 351; dissolution, 229-310; domestic, 310; domination by other corporations, 370; duties of officers, 158; expulsion of members, 56; foreign corporations, 192; formal subscription to stock, 370; incorpor-**

- ation and organization, 36; individual liability of trustees, 229; insolvency, 351; interstate commerce, 15; issuance of stock certificates, 76; liability as partners, 210; liability as surety, 370; liability for mispayment, 291; liability of directors, 229; liability of stockholders, 229-247; liability to assessment, 210; members, 210; mercantile pursuits, 158; mortgage of assets to pay for stock, 406; organization, 158; payment of judgment, 56; pledge of stock, 462; power of state to exclude, 310; power to transfer property, 444; proceedings by state, 136; purchase of property, 291; rates for electric lighting, 351; ratification of agent's acts, 291; receivers, 15-462; recovery of amount paid, 158; recovery of discounted note, 174; refusal of officers to act, 56; repudiation of contract, 389; restriction of powers, 248; right to contest title to corporate property, 310; right to do business in foreign state, 331; rights of stockholders, 56; sale by promoters to corporations, 351; sale of corporate property to directors, 462; sale of franchise, 210; sale of stock, 229-351-370-480; stockholders, 192; subscription to stock, 389; transaction with corporations, 291; transfer of assets, 331; ultra vires acts, 210; ultra vires contracts, 406; unauthorized acts of officers, 248; unconscionable purchase of property, 331; unpaid stock subscription, 480; voidable contracts, 192; what law governs, 15.
- Costs**—on appeal, 370; security, 136; tender, 480.
- Counties**—collection of taxes, 351; criminal prosecution, 96; duties of sheriff, 158; illegal taxes, 291; juvenile courts, 136; liability for acts of officers, 444; liability for torts, 480; refusal to allow claim, 291; taxation, 210.
- Courts**—adjudications, 96; appellate jurisdiction, 192; comity, 76; conflicting jurisdiction, 36; error of state court, 174; expiration of term, 351; failure of judge to attend court, 229; federal questions, 158; following decisions of state courts, 351; jurisdiction, 56-136-192-370-424; priority of jurisdiction, 481; statutes of other states, 210; stenographer's fees, 310; supervisory jurisdiction, 351; transitory actions, 269-481; void ordinances, 424.
- Covenants**—breach of warranty, 389; building restrictions, 444; construction, 57; estoppel, 424; right of way, 310; validity, 174.
- Creditor's Suit**—pleading, 210; validity of judgment, 406.
- Criminal Evidence**—admissibility, 291; admission of evidence, 158; bill of exceptions, 36; blood-hounds, 310; competency, 310; confession, 389; confronting opposing witness, 16; contents of diploma, 444; dying declarations, 76; effect of nolle pros of co-defendant, 445; harmless error, 248; homicide, 174; judgment of conviction, 406; matters of opinion, 16; offer of proof, 76; petition for certiorari, 291; rebuttal, 57; res gestae, 16-36-210; similar offense, 136; violation of ordinance, 36.
- Criminal Law**—admissions, 210; aiding and abetting, 269; alibi, 462; appeal, 210; appealable orders, 269; arrest, 462; attacking defendant's character, 136; attempt, 291; certificate of reasonable doubt, 331; disorderly houses, 96; disqualification of juror, 310; effect of probation, 407; escape pending appeal, 310; extent of punishment, 36; former jeopardy, 57; jurisdiction, 136; limitation, 291; nolle prosequi, 331; parties entitled to allege error, 96; pleadings, 407; questions for review, 210; removal of prisoner for trial, 36; res gestae, 481; self-defense, 16; time for taking appeal, 95; venue, 424; verdict, 76; when appellant pays fine, 291.
- Criminal Trial**—acquittal, 310; acts constituting continuous offenses, 116; acts showing system to habit, 462; admissibility of evidence, 158; arraignment, 389; argument of counsel, 211-229; argumentative instructions, 16; burden of proving alibi, 192; change of venue, 136-269; circumstantial evidence, 310; comments of counsel, 36; commission of offense by innocent, 192; conduct of counsel, 136; constitutional questions, 407; continuance, 36-211; conviction, 291; degree of crime, 445; degree of offenses, 481; disorderly house, 462; embezzlement, 76; error in continuing case, 291; failure to allow continuance, 407; favorable error, 331; form of verdict, 158; former jeopardy, 269-292-389; identity of accused, 292; illegal sale of liquor, 76; insanity as a defense, 229; instructions, 57-95-192-331-424; interpreters, 211; jurisdiction, 16-248; killing animals, 76; motion for new trial, 269; newly discovered evidence, 211; other offenses, 462; prejudicial error, 211; preliminary hearing, 36; presence of accused, 192; province of jury, 158; rape, 351; remarks of counsel, 96; rape, 36; request to charge, 16; reversible error, 76; right to appeal, 249; sufficiency of proof, 424; testimony of accomplice, 249; venue, 96; verdict, 229; withdrawal of plea, 136.
- Curtsey**—equity of redemption, 481.
- Customs and Usages**—incorporation of custom, 158; legality, 389; reasonableness, 292; unambiguous contracts, 370.
- Customs Duties**—invoice value, 76; specific exemption from general provisions, 76.
- Damages**—action for breach, 481; anticipated profits, 96; breach of agreement to pay money, 292; breach of contract, 174-211-407; breach of executory contract, 389; compensation, 424; contract to deliver bonds, 211; deeds, 16; duty to minimize, 248; excessive damages, 331-424; excessive verdict, 16; excessive verdict, 292; exemplary damages, 211; failure to submit to physical examination, 96; future pain and suffering, 249; growing crops, 116; imaginary suffering, 370; injury to person and property, 462; intoxicating liquors, 116; liquidated damages, 292-331; loss of earning capacity, 229; mental suffering, 16; mental suffering, 310; measure of damages, 16; mental suffering, 16; mortality tables, 462; nominal damages, 174-445; personal injuries, 136-331-424; pleading, 57; pleading and proof, 36; punitive damages, 481; speculative and remote, 116; sufficiency of petition, 229; temporary injury to real estate, 96; verdict, 351; what law governs, 269.
- Dead Bodies**—delivery and acceptance, 463; negligent handling of corpse, 249.
- Death**—burden of proving negligence, 230; damages, 76-425; excessive verdict, 76; negligence, 96; parties, 425; parties to action, 351; persons entitled to sue, 389; presumptions, 126-158; presumptions as to survivorship, 425; proximate cause, 116; right of action, 116; statutes, 36.
- Dedication**—highways, 36; intent, 158; maps, 136; persons authorized to make, 76; reservation, 481; streets and alleys, 249.
- Deeds**—acceptance, 445; construction, 36-116; delay in recording, 158; delivery, 57-136-230-425; dures, 230; estate conveyed, 370; rule in Shelley case, 230; time for taking effect, 351; undue influence, 96-192-310-389-445; what constitutes, 76.
- Depositaries**—husband and wife, 370.
- Depositions**—certificate of officer, 192.
- Descent and Distribution**—action by distributees, 16; administrator de bonis non, 445; advancements, 96; common law marriage, 445; conveyance, 211; conveyances, 407; custody of children, 351; involuntary alienation of property, 269; laches, 425; personal property, 425; presumption of death, 158; what law governs, 76.
- Discovery**—claim of privilege, 57; physical examination, 96; production of writings, 310.
- Dismissal and Nonsuit**—consent, 331; directing verdict, 211; jurisdiction, 425; request for judgment, 116; setting aside dismissal, 481.
- Disorderly House**—evidence, 249.

District and Prosecuting Attorneys—compensation, 36.

District Attorney—powers and duties, 370.

Disturbance of Public Assemblage—religious worship, 16.

Divorce—abandonment, 292; alimony, 76-116-159 174-370; annulment, 57; appealable orders, 192; condonation, 425-445; cross-bills, 463; cruelty, 331; custody and maintenance of children, 370; custody of children, 292-481; desertion, 136-425-481; evidence, 425; grounds, 76; homestead, 481; property previously conveyed, 463; sufficiency of evidence, 211; suit money, 370.

Domicile—declaration, 445; evidence, 57-425.

Dower—conveyance before marriage, 76; estoppel, 211; lien, 407; post nuptial agreement, 159; property subject to dower, 425.

Drains—creation of indebtedness in advance, 463; parties to drainage proceedings, 407; proceedings for establishment, 310; proceedings to clean drain, 230.

Druggists—liability to persons purchasing drugs, 389.

Easements—construction of grant, 136; extent of damage, 292; extent of way, 292; increase of use, 336; intent of parties, 136; right of way, 463; severance of title, 351; stairways, 76; streets, 192; way of necessity, 269-310.

Ejectment—defenses, 481; executory contracts, 292; identification of property, 211.

Election—attempts to offer a vote, 249; contests, 193-211-269-445; non-resident electors, 117; party designation, 310; police powers, 211; political parties, 352; qualification of voter, 425; registration committee, 96; violation of election laws, 174.

Election of Remedies—acts constituting, 174; conclusiveness, 310.

Electricity—care required, 269; contributory negligence, 96; injuries, 136; municipal corporations, 193; negligence, 311-331; places attractive to children, 463.

Embezzlement—indictment, 463.

Embracery—attempts to corrupt juror, 407.

Eminent Domain—award by commissioners, 311; bridges over navigable streams, 370; closing of alleys, 407; collateral attack, 211; compensation, 76-97-117-211; condemnation proceedings, 136; conditions precedent to action, 174; easements, 211-292; effect of procedure, 117; expropriation suit, 193; injury to property, 331; injury to surrounding land, 481; measure of damages, 117; pleading, 77; proceedings to take property, 57; property which may be taken, 331; remedies of property owners, 36; right of abutting owners, 389; right of grantor, 174; right of multiplicity, 352; right of remaindermen, 249; right to damages, 331; riparian rights, 97; school lands, 352; view by jury, 137; what constitutes appropriation, 77; who may appeal, 331.

Equity—additional findings, 211; adequate remedy at law, 193; counting, 249; dismissal of bill without prejudice, 352; enforcement of trust, 97; final decree, 211; judgment for damages, 292; judgment pro confesso by one of several defendants, 292; jurisdiction, 117-389; mistake in court proceedings, 269; mistake of law, 193; objection to jurisdiction, 249; pleading, 77-137; relief awarded, 352; scope of review, 481; specific performance, 57-292.

Escape—what constitutes, 269.

Escheat—deposits in court, 371.

Estates—future estates, 57.

Estoppel—bills and notes, 481; burden of proof, 463; change of theory, 249; claim to property, 389; clothing another with apparent title, 425; covenants, 292; denial of liability,

16; easements, 311; effect as against grantee, 159; failure to assert title, 77; infringement of patent rights, 198; lost deed, 137; persons whom available, 311; position in litigation, 230; ratification of acts of others, 97; representations, 77; subscription to capital stock, 389; tax deeds, 193; tenants in common, 249.

Evidence—admission, 425; admission by employee, 389; assignment of mortgage, 463; as to existence of writing, 445; best and secondary, 407; bloody clothing, 249; conditional sale, 389; copy of deed, 212; declaration of grantor, 292; delay in transporting cattle, 212; documentary, 16; documents, 77; expert testimony, 16-77-117-213-463; expert testimony as to value, 57; extrinsic evidence, 97; failure to object to introduction, 77; foundation for secondary evidence, 463; handwriting, 57-270; hypothetical questions, 57; insanity, 97; interrogatories, 371; judicial notice, 16-174; lost will, 16; market value, 249; memorandum, 311; mortality tables, 407; motion for security of costs, 77; negligence, 77; opinion evidence, 36-137-193-332; parol, 193; parol evidence, 97; pecuniary condition, 117; personal injuries, 425; presumptions, 57-97-159-174-352; presumptions as to intoxication, 352; presumptions as to official duties, 332; proof of agency, 463; qualification of expert, 425; questions calling for opinion, 352; recitals in deeds, 212; relevancy, 159-445; res gestae, 445; secondary evidence, 36; self-serving declarations, 117-292; speed of automobile, 481; statement of witnesses, 117; telephone conversations, 425; value of evidence, 117; value of property, 481; waivers, 36; written contract, 57.

Exceptions, Bill of—motion for new trial, 36; number of bills, 212; signature of judge, 352; time for filing, 249; time of settlement, 445.

Exchange of Property—abandonment of property, 137.

Execution—claims of third persons, 117; forthcoming bond, 230; innocent purchasers, 77; issuance, 147; mortgaged personality, 371; right of purchaser, 332-445; right to stay, 352; sale, 159; sale of assets, 463; validity of judgment, 97; validity sale, 481; withdrawal of claim res judicata, 117.

Executors and Administrators—accounting, 77; action for death of decedent, 445; allowance of claims, 332; breach of bond, 463; checks by testator, 57; claims against estate, 230-292-311; claims of non-resident creditors, 77; contract to sell land, 16; discovery of assets, 352; discovery of new will, 211; effects of ancillary appointment, 425; equitable conversion, 407; findings of trial court, 425; homestead, 16; limitation of action, 292; mortgages, 426; payment of claim, 57; removal, 37-292; sale of land, 117-230; sale of property, 249; settlement of claims, 481; suit to try title, 212; title and rights, 137.

Explosives—injuries from blasting, 463.

Extortion—what constitutes, 97.

Factors—misconduct, 193.

False Pretenses—elements of offenses, 407; fraudulent checks, 463; indictment, 137.

False Imprisonment—justification, 77.

Federal Courts—appeal from circuit court, 389; diverse citizenship, 193; equitable relief, 271; federal questions, 389; injunction against statutory transportation, 193; jurisdiction, 57-270-390-407; protection of party from state authorities, 445; rules of decision as between different circuits, 249; validity of state statute, 17.

Fences—destruction, 426.

Fines—involuntary servitude, 17; power of court to remit, 212; rights and remedies of informer, 292.

Fire Insurance—action against agent, 97; assignment, 37; authority to waive, 407; con-

- tract of insurance, 270; earthquake clause, 352; estoppel, 174; insurable interest, 77; keeping itemized account, 352; mutual companies, 193; non-payment of premium, 37; powers of agent, 212; time for proving loss, 57.
- Fish—legislative control, 117; powers to regulate, 332; rights of navigable waters, 463; riparian rights, 407.
- Fixtures—bona fide purchasers, 174; effect of lease, 332; henhouse, 17; intent in making annexation, 137.
- Food—liabilities of manufacturer, 426.
- Forcible Entry and Detainer—right of plaintiff to possession, 390.
- Forgery—indictment, 270; information, 57; uttering forged note, 212; what constitutes, 371-463.
- Fraud—action for deceit, 249; action to rescind sale of stock, 17; consequential damages, 137; damages, 293; evidence, 97-352-463-482; false representation, 371; knowledge of falsity, 390; laches, 249; means of knowledge of parties, 482; pleading, 212; presumptions, 17-371; what constitutes, 371.
- Frauds, Statute of—agency to sell land, 426; agreements not to be performed within a year, 77; assignment, 250; availability, as defenses, 426; contract performed as to part within statute, 331; contract to convey land, 426; debt of another, 270-311; delivery and acceptance, 77; estoppel, 332; evidence, 159; executed contract, 352; oral acceptance of written offer, 37; parol contract, 293; parol gift of land, 212; part payment, 230; part performance, 212-293; pleading, 137; sale of land, 137-445; sale under foreclosure, 371.
- Fraudulent Conveyances—action to set aside, 332; burden of proof, 58; consideration, 77; creation of debt, 250; evidence, 17; fraudulent interest, 407; gifts, 426; homestead, 270; intent to defraud, 230-270; payment of debt to wife, 293; presumptions, 137-159; relief against transferee, 58; remedies of creditors, 159; validity of transaction between parties, 332.
- Game—purpose of game law, 390; right to hunt on navigable waters, 463.
- Gaming—gambling devices, 371; sales for future delivery, 390.
- Garnishment—amendment of return, 407; claims of third persons, 97; effect of judgment for garnishee, 446; failure to answer, 137; judgment, 58; nature of remedy, 426; non-resident defendants, 77; property subject, 293-463.
- Gas—franchises, 390; use of streets, 390; value of franchise, 37.
- Gifts—causa mortis, 137; causa mortis and inter vivos, 117; evidence, 311; possession, 371.
- Good Will—sale by professional man, 464.
- Grand Jury—drawing jurors, 97; interpreters, 407; objections to drawing, 445; presence of attorney in grand jury room, 77; qualifications, 37.
- Guaranty—amount recoverable, 408; bills and notes, 212; change of conditions, 117; extent of liability, 159; scope of extent, 332.
- Guardian and Ward—action by ward, 193; care of ward's estate, 159; estoppel, 445; parol exchange of land, 17; settlement, 408; unauthorized investments, 230.
- Habeas Corpus—conclusiveness, 482; conclusiveness of judgment, 464; custody of children, 464; determination of issues, 352; federal courts, 159; hearing, 212; object of will, 270; questions reviewable, 230; time for application, 311.
- Highways—alteration of width, 230; appointment of commissioner, 58; automobile causing horse to frighten, 230; defects causing injury, 390; drainage of highways, 97; establishments, 408; legislative control, 446; negligence, 371; notice of claim for injuries, 137; obstruction, 78-464; regulation, 230; right to use, 137; use for travel, 37; what constitutes, 37.
- Holidays—judicial proceedings, 390.
- Homestead—abandonment, 270-426-464; chattel mortgages, 250; contract to convey, 311; devise by widow, 464; enforcement of right, 97; exemptions, 408; existence of right, 97; occupancy and use, 97; property constituting, 37; property subject, 352; rights of creditors, 371.
- Homicide—assault with intent to kill, 352-426-446; attempt, 293; communicated threats, 482; cross-examination, 446; design to kill another, 159; duty to retreat, 250; dying declaration, 17-78-117-174-426-446-482; evidence, 37-390; indictment, 212; instruction, 270; justification, 464; malice, 17-250-390; manslaughter, 270-293-426; motive, 270; principals and accessories, 311; provocation, 408; requisites of indictment, 17; self-defense, 17-212-426-446.
- Husband and Wife—action between, 78; action for alimony, 426; alimony, 293; amendment of marriage, 446; ante-nuptial agreement, 97; annulment of marriage, 446; community property, 97-212-270-293-464-482; constructive trusts, 78; contract at common law, 311; contract of wife to adopt, 137; debts of wife, 58; estate by entirety, 212-371; homestead, 322; incompatibility of temper, 426; injuries, 17; injury to intended wife, 408; minor husband, 37; physician's services, 78; property of wife, 212; property rights, 332; rights of survivor, 17; sale of land by wife, 464; separate community property, 58; separate estate, 78; separate maintenance, 212; separation agreements, 193; wife's earnings, 464.
- Incest—indictment, 212.
- Indians—land allotment, 332; status of Indian nations, 97.
- Indictment and Information—forgery, 230; grand jury, 175; indorsement, 212; joinder of offenses, 482; objections to grand jury, 464; principals in first and second degree, 193; statutory offenses, 98; sufficiency, 37-137.
- Infants—contracts, 17; note of infants, 58; rights of disaffirmances, 250; rights of innocent purchaser, 446; rights of state to custody, 426; service of process, 193; vested right of parent to child's labor, 270.
- Injunction—adequacy of legal remedy, 193; affidavits, 17; criminal prosecution, 175; damages for wrongful issue, 175; discretion of court, 175; dissolution, 78; enforcement of public rights, 78; grounds, 270; grounds for relief, 352; illegal acts of state officers, 175; jurisdiction, 464; labor unions, 408; local option election, 193; municipal corporations, 390; preliminary injunction, 17-137; preventing multiplicity of suits, 37; restraining enforcement of void ordinance, 426; scope of inquiry, 37; secret processes, 352; telephone construction, 117; temporary injunction, 353; trade unions, 58; trespass, 230; use of land, 250; use of streets, 117; validity, 58; violation, 446; when granted, 174-464.
- Innkeepers—licenses, 371; negligence operation, 17.
- Insane Persons—appointment of guardian, 98; collateral attack on appointment, 194; inquisition, 175; presumptions, 78; undue influence, 250.
- Insolvency—fraudulent transfers, 175.
- Interest—judgment, 137; money wrongfully withheld, 58; time and computation, 159.
- Internal Revenue—distiller's bond, 250; liquor dealers, 482; whisky, 37.
- International Law—charge of sovereignty, 194.
- Interpleader—grounds of relief, 426.

Interstate Commerce—exemption from garnishment, 98; freight rates, 37; labor unions, 38; original packages, 482; police power, 213; power of congress, 137; regulation by state, 175; requiring railroad to operate route, 353; state regulation, 194; what constitutes, 311.

Intoxicating Liquors—action on liquor dealer's bond, 426; application for license, 371; civil damage law, 293-482; disorderly house, 230; fixing saloon limits, 38; illegal contracts, 482; illegal sale, 58-230; indictment, 408; justification of sale without license, 408; liquor license, 332; local option, 17-293-464; Moot case, 194; mulct tax, 98; ordinances, 353; petition for license, 426; proceedings to procure license, 98; regulation, 159; storing for sale, 270; unlawful sale, 17-58; violation of local option law, 78; violation of prohibitory law, 58; withdrawal of name from permit, 159.

Judges—acts off the bench, 371; disqualification, 117-194-270-311; right to jury trial, 175.

Judgment—administrator's settlement, 98; authority to enter, 270; clerical misprison, 270; collateral, 270; collateral attack, 159; conformity to pleadings and issues, 390; conclusiveness, 58-159-270-332-482; conformity to pleadings, 175; correction, 38; default, 98; dismissal of action, 230, estoppel, 353; foreign judgment, 293; full faith and credit, 353; lien, 17; life estate, 446; matters concluded, 137; motion for, 3-230; of sister state, 390; parties, 159-464; parties bound, 464; power of court, 175; report of commissioner, 138; res judicata, 38-175-194-250-332-371-427-446; revival, 138-390; state and federal courts, 250; support in pleadings, 194; vendor's lien, 446; what constitutes, 427.

Judicial Sales—conformation of sale, 371; proceedings to vacate, 426; right of buyer, 371.

Jury—Competency, 138; disqualification, 38; exclusion of negroes, 17; juror witness in same cause, 17; juvenile courts, 175; misconduct of others affecting jurors, 311; peremptory challenges, 117; prejudice of sheriff, 231; relationship to accused, 117; right to jury trial, 194.

Justices of the Peace—amendment of judgment, 58; appeal, 250-464; certiorari, 38; continuance, 138; equitable jurisdiction, 293; jurisdiction, 17; service of process, 78.

Landlord and Tenant—abandonment of premises, 390; action for rent, 38-58-464; agreement by lessor, 482; constructive eviction, 353; covenants for quiet enjoyment, 159; cropping contracts, 58-311; damages for turning off heat, 332; defective premises, 332; distress, 270; duty of lessee, 311; election to renew lease, 118; estoppel to deny landlord's title, 332; estoppel of tenant, 271; failure to execute renewal of lease, 175; failure to repair premises, 371; forfeiture of lease, 353; holding over, 311; improvements, 353; injuries to crops, 231; injuries to third persons, 159; leases, 118-175-194-250-311-408; liability for rent, 332; liability of landlord, 390; liens, 271; lien for supplies furnished, 194; obligation of tenant, 231; option to purchase, 160; plaintiff's held tenants at will of defendants, 231; recovery of premises, 353; repairs, 250; right of subtenant, 58; right to sue for rent, 482; surrender of term, 427; tenancy from year to year, 138; tenancy at will, 250.

Larceny—evidence, 58; indictment, 194; possession by owner, 18; wife's separate property, 250.

Libel and Slander—actionable words, 332; evidence, 160; malice, 18-427; privileged communications, 271-482; reports of legal proceedings, 482; special damages, 408; sufficiency of complaint, 250; venue, 231.

Licenses—authority of municipalities, 293; gas companies, 58; ordinance, 160; revocation, 69; loss of lien, 59.

Life Estates—crops, 353; income, 138; lease by life tenant, 312; mortgages, 293; reservation, 427.

Life Insurance—acceptance after maturity, 371; beneficiaries, 98; breach of agency contract, 446; insurable interest, 390; notice of premium, 371; overdue premiums, 293; payment of premium, 464; pleadings in action on policy, 390; presumptions, 293; presumption of death, 118; reinsurance, 312; solvency of company, 353; warranty, 118; what law governs, 160.

Limitation of Actions—absence from state, 250; accrual of cause of action, 427; accrual of right of action, 482; action by former insane person, 194; action on accident policy, 353; alimony, 118; applicability of statute, 250; applicability to claim, 175; application of payments, 353; bar of debt as affecting security, 194; bar of debt as an affording security, 464; commencement of action, 213; common law and statutory copyrights, 250; compilation from public record, 18; constructive trusts, 390; conveyances in fraud of dower, 78; defenses, 482; effects of request not to sue, 118; exclusive property, 160; foreclosures, 390; fraud as ground of action, 175; part payment, 98; plea of accrual of action, 78; public lands, 231; relief on ground of fraud, 118; running of statute, 194-312; unlawful structures in street, 138; waiver of bar, 293; what law governs, 38.

Lis Pendens—notice, 138.

Literary Property—uncopyrighted publication, 194.

Logs and Logging—enforcement of lien, 18; license to cut timber, 271; ownership of sunken logs, 372; performance of contract, 18; scale bill, 332; standing timber, 391.

Lost Instruments—deeds, 465; evidence to establish contents, 250.

Lotteries—recovery of price paid, 293.

Malicious Mischief—evidence, 98.

Malicious Prosecution—contempt proceedings, 18; necessity, 176; payment of money under duress, 231; petition, 118; probable cause, 18-118.

Mandamus—acts of officers, 176; acts of public officer, 194; adequacy of other remedies, 408; appointment of guardian, 98; contract with teacher, 160; corporations, 408; counties, 98; hearing on agreed case, 18; illegal removal from office, 59; issuance of diplomas, 293; judicial notice, 271; nature of action, 59; payment of salary, 294; state board, 391; title to office, 78; when lies, 38; when writ issues, 118; where lies, 312-353.

Marine Insurance—transfer of cargo, 59.

Maritime Liens—domestic vessel not in commission, 38; master's authority to pledge credit, 18.

Marriage—annulment, 78; common law marriages, 118; estoppel, 465; guilt of illegal marriage, 353; liabilities of parties to illegal marriage, 231; presumption, 194; what constitutes, 118-482.

Marshalling Assets and Securities—enforcement, 176.

Master and Servant—acts of superintendent, 372; assumed risk, 18-78-98-194-271-294-312-353-372-408-427-446-465-482; brakeman's reliance on tell-tales, 391; burden of proving negligence, 251; care required, 98-176; cause of injury, 98; coal mines, 446; concurrent negligences, 294; continuance of employment, 391; contract of employment, 294-408; contributory negligence, 18-59-78-176-231-353; defective appliances, 98-251-312-333-372-465; defective machinery, 482; duty to master, 160; duty to obedience, 118; duty to safeguard machinery, 294; duty to warn, 59-118; employer's duty, 351; employment of child labor, 271; employment of incompetent

- servant, 372; employment of minor, 294; exposure to infectious disease, 194; failure of servant to observe rule, 312; failure to pay employee, 372; fellow servants, 38-231-294-465-483; hazard of employment, 118; incompetency of fellow servant, 353; independent contractors, 294; injury to servant, 98-138-169-294-354-372-391-408-446 483; in jury to third persons, 78-118-271-354; leases, 18; master's liability, 176; negligence, 294-446; negligence in employing incompetent servant, 38; negligence of servant, 333; operation of trains, 176; personal injuries, 18; personal services, 231; reliance on care of master, 118; responsibility of master for injury to employee, 38; right to invention of servant, 231; risks assumed by servant, 18; safe instruments, 294; safe place to work, 118-251-271-294-312-333-372-446; statutory provisions, 427; unguarded machinery, 176; vice principal, 427; wrongful discharge 312.
- Mechanics' Lien**—materialmen, 118; nature of remedy, 195; original contractor, 138; right to enforce, 333; right to lien, 446-483; separate contracts, 78; signature of lienor, 118.
- Mines and Minerals**—conflicting lode locations, 354; construction of oil leases, 483; deeds, 408; fixtures, 483; improvement charges, 465; leases, 38; natural gas, 312; notice of claims, 213; oil and gas lease, 176; partnership, 118; proceedings on adverse claims, 354; reservation in deeds, 294; rights of locator, 294; statutory regulations, 78; work done by stockholder, 138.
- Miscellaneous Insurance**—fidelity of employees, 176.
- Money Received**—money received under claim of right, 446.
- Monopolies**—combination in restraint of commerce, 59; combination in restraint of trade, 294; enticement of employees, 354; restraint of trade, 18-176.
- Mortgages**—assignments, 176; assignment of debt, 98; assumption by purchaser, 213; change in form of debt, 195; consideration, 427; construction of terms, 231; contract to reconvey, 119; conveyance to mortgagee, 176; coupon notes, 138; deed absolute, 38; easements, 231; effect of unrecorded deeds, 271; extension of time for payment, 195; failure to record deed, 427; foreclosure, 38-78-119-160-391-427-447; interest, 119; notice of prior deed, 408; partial release, 483; payment of debt, 214; prior quiet-claim, 447; redemption, 465; redemption of land sold, 176; right to rely on entire mortgaged premises, 391; sale by trustee, 98; subrogation, 354.
- Municipal Corporations**—acceptance of work, 195; actions, 409; action of tax deed, 160; appointment of officers, 409; assessments for local improvements, 231-391; assumed risk, 333; bill to abate public nuisance, 391; bond issues, 251; bonds, 119; bridge ordinances, 251; care required as to condition of streets, 231; change of street grade, 99-195; charter officers, 391; charter powers, 18; city council, 354; closing streets, 176; commitment under municipal ordinance, 333; construction of policy, 391; contracts, 271; contract bids, 333; contracts for public service, 483; contract with former trustee, 79; curative statutes, 138; damages for change in street grade, 99; dedication of highway subject to easements, 79; defacto corporations, 372; defective sidewalks, 18-354-372; defective streets, 271-465; demolition of buildings, 18; discharge of employees, 119; donation of appropriation of public funds, 465; evidentiary matters, 160; excavation in roadway, 59; extra-territorial jurisdiction, 18; fiscal management, 391; general powers, 483; granting street railway franchises, 79; highways, 333; improvements, 176; insurance, 176; irregularities in organization, 447; leaving vehicle in street, 427; liabilities for torts, 231; liabilities on official bond, 465; negligence, 354; negligence of officers, 427; obstructions, 312; obstruction of streets, 231-312; officers and employ-
- ees, 294; ordinances, 138-271-483; pleading, 409; pollution of stream, 119; powers, 391; power to issue bonds, 354; proceedings of city council, 138; removal of awnings, 38; removal of employees, 38-427; removal of policeman, 59-333; repeal of ordinance, 483; retrospective taxation, 18; revocation of building permit, 160; rights of laborers in street, 138; sewer contracts, 447; sewer improvements, 391; smoke ordinance, 427; statute authorizing indebtedness, 333; street improvements, 176-213; structure in street, 138; suspension of policeman, 465; torts, 59-138; use of streets, 312-427; use of streets by pedestrians, 465; validity of ordinance, 38-79; validity of tax sale, 160; verification of personal injury claims, 391.
- Names**—idem sonans, 294; identity, 176.
- Navigable Waters**—grounds, 391; nuisances, 354; public lands, 312; riparian rights, 372; state control of lands under waters, 483; tide lands, 79.
- Ne Exeat**—grounds, 391.
- Negligence**—action against joint tort feasers, 59; acts in emergencies, 271; assumption of risk, 59; contributory negligence, 409-99; dangerous premises, 38-99-409-333-312; defective appliances, 391; degree of care required, 392; duty to use cars, 176; duty toward licensee, 79; evidence, 138; exposure to danger, 176; failure to keep premises in repair, 177; imputed negligence, 372-138; last clear chance, 312; liability of vendors, selling dangerous substances, 295; meaning of "per se," 195; natural and probable consequence, 231; necessity of showing, 139; parties liable, 38; places attractive to children, 465-312; places open to public, 177; placing canvas covers over trees near railroad track, 295; pleading, 160-295; presumption and burden of proof, 372; proof, 251; proximate cause, 333-447; question for jury, 333-231; reasonable care, 392; res ipsa loquitur, 39-312-372-231-195-427; steam boilers, 139; use of flue, 295; what constitutes, 177.
- New Trial**—discretion of trial court, 99; extent, 427; misconduct of jury, 99-447; motions, 79; notice of intention to apply, 139; refusal, 119; sur-rise, 251.
- Notice**—necessity, 295.
- Nuisance**—acquisition of rights by prescription, 483; explosives, 271; injunction, 483-160-99; livery stable, 251; navigable waters, 392; personal discomfort, 469; pipe lines, 18; pleading and proof, 428; prescription, 169; proof required to warrant injunction, 295; right of injunction, 195; right to abate, 119; use of land, 195; what constitutes, 447.
- Obstructing Justice**—legal process, 483.
- Officers**—compensation, 392; creation, 79; effect of resignation, 295; election to fill vacancy, 19; resignation, 232.
- Pardon**—rights of plaintiff, 177.
- Parent and Child**—consent to employment of minor son, 392; custody of child, 312; minor employees, 19; right of custody, 354; right to custody of child, 271.
- Parties**—intervention, 139; necessary parties, 119.
- Partition**—estoppel, 19; laches, 99; parties, 409; property subject, 428; riparian rights, 59; right to partition, 99; sale, 312; who may maintain, 39.
- Partnership**—admissions of partner, 465; apparent authority of agent, 232; as to third persons, 39; attorney's fees on firm note, 409; banking firm, 39; dissolution, 177; distribution of assets, 295; firm debts, 312; impeachment, 139; liabilities as to third persons, 232; liabilities to creditor, 428; liability of dormant partner, 251; liability of partner, 213; mechanics' liens, 139; mutual rights, 372; nature of relation, 79; negotiable instruments, 295; real estate acquired by partner, 79; realty, 213; right of partners to attend to individual interests, 232; scope

- of business, 79; transactions between partners, 372; what constitutes, 119; who are partners, 195.
- Party Walls—easements, 313; what constitutes, 177.
- Patents—assignments, 213; effect of non-user, 392.
- Paupers—duty of towns to relieve, 119.
- Pawnbrokers—conversion, 447.
- Payment—acceptance of draft, 272; by check, 99; checks, 79; extension of credit, 39; mistake of fact, 195; mistake of law, 483; presumptions, 213-447; replevin, 213.
- Penalties—evidence, 39.
- Perjury—false oath in bankruptcy proceedings, 139.
- Perpetuities—computation of period, 409; gifts to parties, 59; trusts, 195.
- Physicians and Surgeons—compensation, 372; magic healers, 313; practice of medicine, 195.
- Pleading—action on note, 119; allegations admitted by failure to deny, 409; alternative pleading, 99; amendment, 19-79-139; answer, 119; causes of action, 119; clerical error, 99; departure from original bill, 447; election between causes of action, 447; executory contracts, 139; facts or conclusions, 19; general demurrer, 99; motion to make more definite, 251; oyer of instrument sold on, 139; petition, 39; residence of partners, 251; striking out matters, 19.
- Pledges—choses in action, 295; conversion by pledged note, 465; remedies, 251; substitution of collateral, 428; warehouse receipt, 232.
- Post Office—action on bond, 409.
- Powers—execution, 139.
- Principal and Agent—acting for parties adversely interested, 79; authority of agent, 19-99-139-213-333-409-428-483; compensation for services, 39; constructive notice, 232; discharge of surety, 232; estoppel to question authority, 59; liabilities as to third persons, 119; liability for acts of agent, 139; liability of principal, 213; nature of agent's obligation, 39; notice to agent, 119; payment of note, 313; power of attorney, 39-232; rights of undisclosed principal, 177; sale of seat in cotton exchange, 272; sale of goods on commission, 59; termination of agency, 195.
- Principal and Surety—assignment of contract, 232; discharge of surety, 232; extension of time for payment, 465; liability of surety, 232-372.
- Process—alias summons, 295; defects, 213; exemptions, 392; remedy of person wrongfully served, 177; service, 372; service of summons, 295; service on non-residents, 372.
- Prohibition—injunction, 295; nature of writ, 19; parties defendant, 409; remedy by appeal, 99; violating Sunday laws, 59.
- Property—secret formula, 177.
- Public Lands—actual settler, 465; cancellation of patent, 373; cutting timber, 484; estoppel, 313; fraud, 251; homestead, 272-333; limitation of actions, 242; muscongus grant, 119; railroad land grants, 39; tide lands, 251; title to bed of stream, 177; town sites, 99.
- Quieting Title—ante-nuptial agreement, 99; cancellation of deed, 272; cloud on title, 195; parties plaintiff, 79; proceedings and relief, 232; relief to defendant, 19; unlawful entry into possession, 373.
- Railroads—accident at crossing, 213; attracting children to tracks, 373; care of passengers, 251; care required as to trespassers, 354; conditions printed on ticket, 484; continuous trip, 333; contract for exemption from liability, 195; contributory negligence, 484; defective crossing, 373; duty of engineer, 466; duty of pedestrian, 409; duty to fence track, 313; effect of appointment of receiver, 484; fences, 409; fire caused by contributory negligence, 447; frightening animals, 428; frightening horses, 39; highway crossing, 177; injuries to animals, 213; injury to child, 232; injury to deaf person on track, 409; injury to employee, 177; injury to licensee, 466; injury to pedestrian at crossing, 295; injury to pedestrian under bridge, 39; injuries to persons on track, 213-295; injury to traveler at crossing, 99; injury to trespasser, 333; laborers, 39; leases, 139; negligence, 79-177-295; right of way, 59; side-tracks, 119; state regulation, 373; street crossing accident, 59; use of railroad trestle as footpath, 272; vibration and noise as a nuisance, 373; who are passengers, 313; wrongful ejection, 373.
- Rape—assault with intent to rape, 373; evidence, 409.
- Real Action—pleadings, 19.
- Receivers—appointment without notice, 177; compensation, 99-213; liens, 373; mortgages, 334; nature of receiver's possession, 39; remedies to enforce liens, 119; state dental board, 466; wrongful appointment, 447.
- Receiving Stolen Goods—elements of crime, 19.
- Records—conclusiveness, 19.
- References—common law reference, 79; matter subject to reference, 19; part of issue, 139; report of auditor, 195.
- Reformation of Instruments—intent of parties, 196; mistake, 79; mutual mistake, 139; mutuality of mistake, 119; pleading, 79.
- Release—authority to release, 409; execution, 334; fraud, 484; questions for jury, 409; validity, 466.
- Religious Societies—ecclesiastical controversies, 213; incorporation, 19; judicial supervision, 484; title to property, 409.
- Remainder—adjudication of rights, 313; limitation of actions, 334; time to sue, 373.
- Remainderman—acceleration, 477.
- Removal of Causes—consent of federal jurisdiction, 177; diversity of citizenship, 272-409; federal question, 39; remand, 334; separable controversy, 119.
- Replevin—counterclaim, 232; necessity for demand, 447; right to possession, 120; wrongful distress, 139.
- Review—probate appeals, 313.
- Sales—action for damages, 213; action for price, 251; breach of warranty, 213; caveat emptor, 295; conditional sale, 334-410-484; consideration, 177; defenses, 428; delivery, 466; estoppel, 120-196; evidence, 410; executory contract, 120; fraud, 232-313-354; fraudulent representations, 232; implied warranty, 213-373; passing of title, 139; performance, 39; performance of contract, 99; premature shipment of goods, 39; reasonable time to accept, 139; recoupment in action for price, 39; rescission, 80-295-373-447; rescission by vendor, 296; sale or return, 313; suing on behalf of corporations, 229; time for delivery, 484; transfer of title, 373; warranties, 214; warranty of fitness, 373.
- Salvage—amount of award, 139; nature of service, 214; suit for compensation, 139.
- Schools and School District—dismissal of teachers, 272; government discipline of pupils, 373; mechanic's liens, 120; powers of board, 392; public schools, 214; right to office, 80; trustees, 19; validity of bonds, 214.
- Searches and Seizures—evidence, 313.
- Seduction—exemplary, 373.
- Set-Off and Counterclaim—amount of recovery, 39; cross action, 59; parties to cross-demand, 393; when maintainable, 428.

- Sheriffs and Constables—powers, 296; rule against, 272; settlement with successor, 196; terms of sheriff, 447.
- Shipping—delay in moving vessel, 177; demurrage, 373; failure to surrender freight, 373.
- Signature—mode of affixing, 447.
- Specific Performance—assignment for patent in trust, 447; contract to convey land, 296; contracts enforceable, 59-334; defenses, 428; evidence, 60; general warranties, 232; gifts, 334; ground of remedy, 80; laches, 296-448; oil and gas lease, 178; oral agreement, 373; part performance, 196; pleading, 19; relinquishment of right, 313; right to relief, 373; time as the essence, 466; unrecorded deeds, 80.
- States—claims against, 100; fraud of officers, 178; immunity from suit, 272; legislative, 272; officers, 296; premature sale of municipal warrants, 410; public printing, 374.
- Statutes—construction, 19-120-214-296-313; construction of foreign statute, 232; construction of penal statutes, 214; fixtures, 140; legislative construction, 80; mistake in wording, 178; re-enactment, 466; registration acts, 100; repeal, 448; sufficiency, 448; time of taking effect, 140.
- Stipulation—matters included, 120.
- Street Railroads—after required property, 120; boarding street cars, 232; care of passengers, 428; care required, 232; care required toward trespassers, 100; collisions, 60; collision with vehicle, 39; compelling operation, 484; competency of employees, 410; contributory negligence, 60-374; duty of receivers, 448; excessive speed, 466; failure to give transfer, 410; failure to repair streets, 19; injury to alighting passenger, 100-296-374; injury to child, 334-410; injury to passenger, 140-296-313; injuries to pedestrians, 178; injury to person on track, 100-374; injuries to property, 428; negligence, 60-140-178-392; negligence of motorneer, 428; operation, 178; regulations, 392; rights in street, 80; sale of franchise, 272; use of streets, 120; who are passengers, 100.
- Subrogation—persons making voluntary payments, 178; purchase of mortgaged property, 334; rights acquired, 39; right of mortgages, 100; rights of surety, 214-272.
- Sunday—amusements, 334; compensation for work done on Sunday, 251; labor, 410; secular business or labor, 313; validity of contracts, 178; violation of law, 80.
- Taxation—abatement, 313; assessment, 178; board of equalization, 100; boundaries, 272; collection, 19; constitutional provisions, 178; delinquent taxes, 60; double taxation, 428; estoppel to claim under tax deed, 196; exemptions, 178-466; lands of United States, 40; liability of collector, 392; liability of executor, 214; national banks, 214-410; power of legislature, 448; property devoted to public use, 334; property subject, 19; review by courts, 80; tax deed, 120-196-214-313; tax sale, 60-100-313-334-428; tax titles, 100-120-140-296; transfer of lien to purchaser of tax title, 40; valuation of property, 392; what constitutes collection, 448.
- Telegraphs and Telephones—act of god, 196; consent of owner of lands, 313; damages for failure to deliver message, 178; damages for mental suffering, 374; death message, 313; delay in delivering, 314; delay in delivery of message, 40; delay in transmitting, 196; failure to deliver long distance call, 428; mental anguish, 392; mental suffering, 272-448; municipal corporations, 334; municipal regulation as to rates, 196; negligence, 314-354; parties, 448; right of way, 120; rights on bridges, 19; telephone franchise, 374.
- Tenancy in Common—actions by co-tenant, 80; adverse possession, 314; care and management of property, 100; possession, 40.
- Tender—conditional tender, 80; keeping tender good, 60; sufficiency, 140.
- Territories—scope of local legislation, 410.
- Theaters and Shows—liability for injury to patron, 374; right to admission, 20.
- Time—inclusive or exclusive, 484.
- Torts—acts constituting breach of duty, 334; defenses in general, 60; joint and several liability, 410; what constitutes, 120.
- Towns—change of members of board, 410; procedure of meetings, 196.
- Trade Marks and Trade Names—deception of public, 40; good will of business, 484; infringements, 140; marking of patented article, 140; period of user, 374; unfair competition, 20-272; use of inventor's name, 466.
- Trade Unions—authority of officers, 60; by-laws, 374; payment of strike benefits, 40.
- Trespass—cutting trees, 314; persons liable, 140; title to land, 20.
- Trespass to Try Title—burden of proof, 214; proceedings, 178; right of action, 374; suit to try title, 178.
- Trial—action to recover money, 100; direction of verdict, 60-214-374; evidence, 214; express trusts, 272; illustrations, 296; inferences, 178; instructions, 20-214-252-410-428; instructions ignoring issues, 178; mentioning amount sued for in change, 252; order of proof, 80; peremptory instruction, 214; prejudicial remarks by court, 196; question for jury, 120; reference of court in evidence, 120; reopening case, 100; review, 140; right to grant non-suit, 40; right to open and close, 80; settlement of school lands, 410; special charges, 178; state statutes as evidence, 252; taking question from jury, 466; verdict, 20; will contest, 120.
- Trover and Conversion—abandonment of right to property, 484; action for trespass, 178; damages, 214; damages recoverable, 178; defenses, 252; evidence to establish, 120; measure of damages, 334; tax titles, 120; warehouse receipts, 314.
- Trusts—breach of fiduciary duty, 40; compensation of trustee, 80; construction, 60-120; constructive trusts, 40-296-314-374-410; creation of trusts, 214; duty to keep accounts, 314; enforcement, 120-214; express trusts, 374; following trust property, 20-314; husband and wife, 40; legal title, 296; life estates, 140; negligence, 466; power of beneficiary to dispose of property, 20; right to recover trust fund, 20; spendthrift trusts, 20; transfer of securities, 314.
- United States—Indian commissions, 214; military governor of Cuba, 196.
- Usury—foreign contractor, 392; interest on mortgage, 354; what constitutes, 466.
- Vendor and Purchaser—bona fide purchaser, 296-314-374-392; bond for deed to convey, 100; bond to convey, 227; breach of contract, 20; contract of sale, 20; default of vendee, 296; domicile of defendant, 40; effect of intoxication, 196; forfeiture, 448; fraudulent representations, 252; options, 20; private fire protection, 410; purchaser's right to possession, 484; rescission of contract, 60; shortage in acreage, 196; specific performance, 80; tender of payment, 60.
- Venue—demand for change, 60; petition, 428; water and water courses, 466.
- Warehousemen—admissibility of evidence, 354; bona fide holders, 296.
- Waters and Water Courses—abandonment, 60; action to establish right, 80; agreement as to diversion, 392; appropriation, 100; construction of railroad, 484; damages for flooded lands, 314; defective contract, 20; duties of water commissioner, 334; easements, 314; estoppel, 60; flooding lands, 178; flowage, 448; grant of franchise to use streets, 448; injunction, 60; irrigation, 140; maintenance of dam, 80; manufacturing purposes, 252; non-user of water rights, 60; pollution of stream, 196; private fire protection, 410;

reservation by United States, 448; rights of riparian proprietors, 334; rights to percolating water, 466; rights to the use of water, 374; riparian rights, 448; surface waters, 354-484; use for irrigation, 100; water companies, 410; water rent, 252; water supply, 196.

Weapons—deadly character, 196.

Wills—charities, 40; claim against estate, 178; coercion, 140; conditions and restrictions, 140; construction, 20-60-232-252-272-392-410-428-448-466-484; construction as to "children," 428; construction by trustees, 20; contest, 20-252-484; contingent remainders, 334; declaration of testatrix, 252; decree allowing appeal, 314; estate in remainder, 252; executory gifts, 448; express declaration, 252; inconsistent provisions, 140; intention of testator, 296; land subject to legacies, 334; life estate, 20; mental capacity, 296; nature of estate created, 252; noncupative, 60; provisions for children, 448; revocation, 428; testamentary capacity, 120-354-484; testamentary powers, 40; transaction among devisees, 467; undue influence, 20-100-140-252-428; use of pencil in writing will, 40; validity, 140-410.

Witnesses—admission of writing, 448; bias, 428; change of testimony on second trial, 314; competency, 60-100-252-296-354-392-484; competency of husband, 196; competency of physician, 100-448; constitutional privileges, 160; credibility, 374-392; cross-examination, 80-140-196-252-314-374-410-466; defective sidewalks, 252; demonstrative evidence, 374; examination, 20-252; explanation of testimony, 20; hostility to accused, 484; husband as witness against wife, 296; immunity, 374; impeaching testimony, 410; impeachment, 20-100-252-314-410-448; market value, 252; nature of estate created, 314; necessities furnished wife, 314; privileged communication, 80; re-examination, 410; refreshing memory, 410; right to contradict party's own witness, 374; right to cross-examine, 20; right to impeach, 40; transactions with persons since deceased, 314.

Work and Labor—action for services of child, 314; amount of recovery, 354; breach of contract, 80; compensation of witness, 160; evidence, 40; parent and child, 466; part performance, 80; services in family relation, 448; services of broker, 466; services of wife, 40; value of services rendered, 40-252.

Writ of Error—questions reviewed, 100.

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